REME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 11 1970
JOHN F. DAVIS, CLERK

IN THE

United States Court of Appeals

OCTOBER TERM, [redacted] 1970

No. [redacted] 248

INDIANA REVENUE BOARD, ET AL.
Petitioners,

vs.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and RICHARD M. GIVAN and JOHN F. NEFF;

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

THEODORE L. SENDAK
Attorney General of the State of Indiana
Room 219
State Capitol Building
Indianapolis, Indiana 46204

WENDELL C. HAMACHER
Chief Counsel—Staff
WILLIAM F. THOMPSON
Assistant Attorney General of Counsel

C. E. Pauley & Co., Inc., Indianapolis

Appendix A

STATE EX REL. MASS TRANSP. AUTH. v. INDIANA REV. BD.

Cite as 253 N.E.2d 725

STATE of Indiana, on the relation of the MASS TRANSPORTATION AUTHORITY OF GREATER INDIANAPOLIS, a municipal corporation, Plaintiff,

v.

INDIANA REVENUE BOARD, Edgar D. Whitcomb, as a Member of the Indiana Revenue Board, John K. Snyder, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board, Trudy Slaby Etherton, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, Indiana Department of State Revenue, James O. Mathis, as Commissioner of the Indiana Department of State Revenue, The State Board of Tax Commissioners, Joseph D. Geeslin, Jr., Carleton L. Phillippi, and Durwood Strang, as Members of the State Board of Tax Commissioners of Indiana, Richard D. Green, as Inheritance Tax Administrator, Defendants.[1]

No. 767 A 39.

Appellate Court of Indiana.

In Banc.

Dec. 16, 1969.

Transfer Denied Dec. 17, 1969.

Action to enforce judgment requiring members of State Revenue Board and other state officers to comply with Act

[1] On December 31, 1968, the date of the judgment in this case, the named defendants were the then incumbent officeholders and were named in their capacities as such officeholders, viz: Roger D. Branigin, as a Member of the Indiana Revenue Board; John P. Gallagher, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board; William L. Fortune, Commissioner of the Indiana Department of State Revenue; and Larry P. Mohr and Herbert C. Holmes, as Members of the State Board of Tax Commissioners of Indiana; and T. Michael Smith, as Inheritance Tax Administrator. This court takes judicial notice that these named defendants are no longer in office, and the court, on its own motion has substituted the present incumbents in office as the nominal defendants.

providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County. The Appellate Court held, among other things, that retroactive appeal of Act was not applicable to judgment which was in force prior to repeal and which required compliance with the Act.

Order of payment of judgment.

1. **Appeal and Error** ⇨330(2)

All actions of members of State Revenue Board and other state officers under Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County were ministerial in nature, and when they left office after judgment was entered that they comply with Act, Appellate Court in action to enforce judgment could on its own motion substitute their successors as defendants.

2. **Appeal and Error** ⇨336(1)

Where parties defendants appeared voluntarily and generally in cause without raising issue of Appellate Court's jurisdiction over them, error, if any, was waived.

3. **Appearance** ⇨24(5)

Where a successor party to a cause voluntarily appears, any error in service of process is waived. Burns' Ann. St. § 2-803.

4. **Parties** ⇨59(2)

Where a suit is maintained against a public officer, not the individual office holder, then the successor in office becomes the interested party to the suit.

5. **Constitutional Law** ⇨92
Statutes ⇨273

Generally, General Assembly may retroactively repeal legislation with two exceptions: (1) General Assembly shall not impair vested rights, and (2) General Assembly shall not violate a constitutional guarantee.

6. **Constitutional Law⇨92**

The grant to an agency of the state does not, and cannot, vest rights and can thus be retroactively and prospectively repealed by General Assembly.

7. **Statutes⇨273**

Act repealing retroactively Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County was a legitimate and constitutional exercise of legislative power.

8. **Statutes⇨276(1)**

Retroactive appeal of Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County was not applicable to judgment which was in force prior to repeal and which required members of State Board of Revenue and other state officers to comply with statute. Const. art. 3, § 1.

9. **Constitutional Law⇨52**

The General Assembly cannot interfere with a judicial determination. Const. art. 3, § 1.

10. **States⇨191(2).**

The defense of sovereign immunity was no defense to action to enforce judgment requiring members of State Revenue Board and other state officers to comply with Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County.

11. **Constitutional Law⇨73**

The Appellate Court did not interfere with financial policy of state when it ordered payment of judgment requiring members of State Revenue Board and other state officers to comply with Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County.

12. Constitutional Law⇨67

It is the proper and legitimate function of any court to authorize execution on its judgments; to deny it this right would be to deny existence of judicial branch of government.

13. Taxation⇨908

The Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County is a revenue allocation amendment which provides for allocation of revenues collected under the Inheritance Tax Act. Const. art. 10, § 3.

14. States⇨131

An allocation by law is an "appropriation" of revenues. Const. art. 10, § 3.

See publication Words and Phrases or other judicial constructions and definitions.

15. States⇨181

The statute referring to examination and liquidation of claims against state is not applicable where claim is for enforcement of valid legislative enactment containing an appropriation and allocation of inheritance tax revenues. Burns' Ann.St., § 49-1702.

16. Taxation⇨913½

Under statutes all inheritance tax revenues are placed in inheritance tax account which is maintained as part of general fund, and monies are then appropriated according to allocations schedule contained in appropriation act. Burns' Ann.St., §§ 7-2414, 49-1702, 49-1810, 61-202.

17. Taxation⇨917

Under statutes, if general fund into which inheritance tax revenues are placed has sufficient monies to pay amount allocated by Act of General Assembly, then auditor is bound by law to draw a warrant for that amount on treasurer of state, who is bound by law to honor it. Burns' Ann. St., §§ 7-2414, 49-1702, 49-1810, 61-202.

18. Constitutional Law⇨79

It is not within scope of powers granted to executive branch of government that it should sit as a superjudiciary to decide which laws and judicial determinations it will obey and which it will not. Const. art. 3, § 1.

Donald E. Bowen, John F. Neff, Lieber & Neff, Indianapolis, for plaintiff; Bowen, Myers & Northam, Indianapolis, of counsel.

Theodore Sendak, Atty. Gen., Wendell C. Hamacher, Chief Counsel, for defendants.

PER CURIAM.

A number of issues have been raised in the course of this action which the court deems expedient and necessary to discuss.

This case was originally filed in the Superior Court of Marion County and was removed to this court pursuant to Acts 1965 (2nd Spec.Sess.), ch. 7, § 2, p. 28, Burns' Ind. Stat. Ann., § 3-2121, 1968 Repl., on petition of the Attorney General of Indiana. Section 3 of the Act (§ 3-2122) provides that,

> "* * * the attorney-general shall remove such case to the Appellate Court of Indiana whenever he deems it necessary or desirable for the purposes of the uniform and orderly enforcement and effectiveness of acts of the general assembly of state-wide public interest and concern that the case be determined *by a court with state-wide jurisdiction.*" (Emphasis supplied.)

Following the removal, hearings were held, briefs were filed and arguments were made by both parties to the issues on the merits, all pursuant to statute, and thereafter, on December 31, 1968, this court, speaking through Judge Cooper, entered judgment in favor of plaintiff and against defendants.[2]

[2] State ex rel. Mass Transp. Authority, etc v. Indiana Revenue Bd., Ind. App., 242 N.E.2d 642, 16 Ind. Dec. 334 (1968).

The thrust of that judgment was to hold that House Enrolled Act No. 1818, passed by the 1967 General Assembly of Indiana was unconstitutionally vetoed by inaction of the Governor, and thus, this court deemed said Act to be in full force and effect from and after its effective date.

This court in the traditional exercise of its judicial power simply interpreted the law. Article III, § 1 of the Constitution of Indiana specifically divides the functions of government into three co-equal, exclusive branches. The function of interpreting the law is vested exclusively in the judicial branch. The decision of this court did no more and no less. This court did not usurp a function of the Legislature; to the contrary, life was given to *their* action which theretofore had been unconstitutionally denied.[1]

Subsequently, the defendant filed its petition to transfer to the Supreme Courts which petition was denied with opinion,[2] thus affirming the judgment of this court of December 31, 1968.

Thereafter the General Assembly of 1969 passed House Enrolled Act No. 1115 (Acts 1969, ch. 20), which purported to repeal retroactively House Enrolled Act No. 1818 of the 1967 General Assembly.

The pleadings filed herein serve to raise the following issues for consideration:

1. The validity of the substitution of parties-defendants;
2. The effect of the purported retroactive repealer;
3. The right of the defendants to interpose the defense of sovereign immunity;
4. The effect of the "separation of powers" doctrine upon the decision of this court.

I. SUBSTITUTION.

[1] Defendants argue that, with the exception of John K. Snyder, Treasurer of the State of Indiana, and as a

[1] State ex rel. Mass Transp. Authority, etc. v. Indiana Revenue Bd., Ind., 244 N.E.2d 111, 16 Ind. Dec. 449 (1969).

[2] Acts 1881 (Spec. Sess.), ch. 38, § 654, p. 240, Ind. Stat. Ann., § 2-3232, Burns' 1968 Repl.

Member of the Indiana Revenue Board, all other parties-defendants were improperly substituted to the judgment of this court dated December 31, 1968, by the court on its own motion; were never served with process; and should not be bound by that judgment.

As authority for the above proposition, defendants cite *Cox v. United States*, 9 Wall. (76 U.S.) 298, 19 L.Ed. 579, (1870). The *Cox* holding, however, is not applicable here.

The question raised in *Cox* was whether the newly appointed Secretary of the Interior could be substituted without notice as a party to a writ of mandamus. The judgment of the district court in *Cox* mandated the former Secretary of the Interior and his successor in office to grant a patent for certain lands. The issuance of a patent was held by the Supreme Court to be an act within the discretion of the Secretary of the Interior, and thus a successor in office would have to be given the opportunity to exercise his discretion and would not be bound by a writ issued before such opportunity was afforded. The determinative rationale of the *Cox* decision was that the courts have no power to mandate the discretionary acts of an executive official.

However, the court then distinguished the situation from that where the official was carrying out a ministerial function, as stated at page 298 of 9 Wall. at page 583 of 19 L.Ed.:

> "Discussion of the principle, however, seems to be unnecessary, as all of the cases appear to affirm the same rule, that the writ cannot issue where discretion and judgment are to be exercised by the officer, and only in cases where the act required to be done is merely ministerial, and where the relator is without any other adequate remedy."

In the instant case, all actions required of the defendants under House Enrolled Act No. 1818 are ministerial in nature. Under Article 6, § 1 of the Constitution of Indiana, the Treasurer and Auditor of this State are commanded to "* * * perform such duties as may be enjoined by law; * * *." The duties of the Auditor in this regard are not

discretionary but strictly ministerial and, thus, the question of due process raised in *Cox* is not present here. The prescription of responsibility may not be altered, for the reason that there is no element of discretion available.

The precise issue here raised has been answered by our Supreme Court. In Wood, Treas. v. State ex rel. Seiler, 155 Ind. 1, at pages 7-8, 55 N.E. 959, at pages 961-62, (1900), the Supreme Court established the following precedent for substitution of public officeholders:

> "The petition and alternative writ aver that a prior demand was made of Delos N. Weaver, as treasurer of Elkhart county, and who was at the time such officer, and by him, as such officer, refused; that, pending the action, Weaver's term expired, and appellant, Wood, succeeded him in the office, January 1, 1899, which fact being disclosed by a supplemental complaint, the court substituted Wood as the party defendant.
>
> "The office of county treasurer is a continuing one. The remedy sought was the payment of money by the officer—a purely ministerial function. The demand was against Weaver the officer, and not against Weaver the individual, and when Weaver went out, and Wood went in, the party defendant was the same, but represented by another individual. Wood assumed the office impressed with all the legal duties and obligations that rested upon the officer he then was. He took the office *lis pendens*, and was bound to know the character of the plaintiff's action, and that the complaint charged that a demand of payment had been properly made of his predecessor, and refused, and if it was his pleasure to pay the plaintiff's demand without judicial determination, it was his duty to do so without further demand. To hold otherwise would be to place it in the power of such officers, by the expiration of terms of office and resignations, effectually defeat the ends of justice."

No valid distinction can be drawn between the office of County Treasurer, which is a constitutional office, and the offices held by defendants in the instant case.

While the duties of the Auditor and the Treasurer of this State are not entirely ministerial, the duties required of them by House Enrolled Act No. 1818 are totally and completely ministerial in nature. Thus, it was not improper for this court to substitute the nominal defendants on its own motion.

[2] The court is further constrained to point out on numerous occasions,[5] the parties-defendants appeared voluntarily and generally in this cause without raising the issue of our jurisdiction over them, and thus, error, if any, has been waived.

[3] Additionally, it has been held that where a successor party to a cause voluntarily appears, any error in service of process is waived.

See: Finch, Admr. v. McClellan, 77 Ind.App. 533, 130 N.E. 13, 131 N.E. 236 (1922), (Transfer denied);

Holland v. Holland et al., 131 Ind. 196, 30 N.E. 1075 (1892);

Acts 1881 (Spec.Sess.), ch. 38, § 56, p. 240, Burns' Ind.Stat.Ann., § 2-803, 1967 Repl.

The two issues raised by the defendants, as demonstrated, present no error.

The substitution was a valid exercise of judicial discretion (Wood, *supra*) and by voluntarily appearing in this cause, the provisions for notice were waived. Section 2-803, *supra*.

The named defendants in this action have all been made parties by reason of their ministerial and representative

---

[5] Defendant's petition for rehearing, January 13, 1969;
Defendants' motion to dismiss, April 11, 1969;
Defendant John K. Snyder, motion for enlargement of time in execution of order, October 29, 1969;
Defendants motion to vacate order, October 29, 1969;
Defendants' request for early ruling, November 4, 1969;
Defendants' motion to vacate order, November 7, 1969;
Defendants' petition for stay of execution, November 10, 1969;
Defendants' petition for rehearing, November 10, 1969;
Defendants' motion for new trial, November 14, 1969.

capacities, and for no other reason. Their voluntary and general appearances have waived the error, if any, in the court's substitution.

[4] As additional authority for the substitution, it is well established law in this State, that where a suit is maintained against a public officer, not the individual office-holder, then the successor in office becomes the interested party to the suit.

See: Advisory Board etc. v. State ex rel., 170 Ind. 439, 85 N.E. 18 (1908);

Schrader v. State ex rel. Mason, 157 Ind. 341, 61 N.E. 721 (1901);

State ex rel. v. Long, 174 Ind. 642, 92 N.E. 649 (1910).

II. RETROACTIVE REPEALER.

[5] As a general rule in Indiana, the General Assembly may retroactively repeal legislation with two exceptions:

1. The General Assembly shall not impair vested rights;
2. The General Assembly shall not violate a constitutional guarantee.

See: Johnson v. Board of Commissioners of Wells County et al., 107 Ind. 15, 8 N.E. 1 (1886);

Osann v. Purported Town of Portage, 132 Ind.App. 695, 177 N.E.2d 666 (1962), (Transfer denied);

Guthrie v. Wilson, 240 Ind. 188, 162 N.E.2d 79 (1959).

As the court shall point out herein, there is a third exception.

In County Dept. of Public Welfare etc. v. Potthoff, 220 Ind. 574, at page 582, 44 N.E.2d 494, at page 497 (1942), our Supreme Court stated that,

"* * * counties are political subdivisions of the state and that as such they have no vested or contractual rights in

the disposition of funds derived from general taxation therein which are superior to the public policy of the state as declared by the legislature."

In view of the *Potthoff* analysis, the exceptions noted above, standing alone, would not forestall the right of the General Assembly to repeal House Enrolled Act No. 1818 retroactively, since it could be successfully argued that a political subdivision of the State, such as the Mass Transportation Authority could not in and of itself acquire vested rights by virtue of legislative enactment.

[6, 7] The rationale of the *Potthoff* decision indicates that the grant to an agency of the State does not, and cannot, vest rights and can thus be retroactively and prospectively repealed by the General Assembly. House Enrolled Act No. 1115 of the 1969 General Assembly (Acts 1969, ch. 20) was, therefore, a legitimate and constitutional exercise of legislative power.

[8] This squarely raises the effect of our judgment[6] which preceded the action of the retroactive repealer.

In Columbus, C. & I. C. R. W. Co. v. Board of Com'rs of Grant County et al., 65 Ind. 427, at page 438 (1879), our Supreme Court was confronted with a very similar situation and the following rule of law was established at that time:

---

[6] The judgment entered December 31, 1968, was a *final judgment*. In Logan v. Sult, 152 Ind. 484, at page 438, 53 N.E. 456, at page 458 (1899), our Supreme Court said, "* * * for all purposes other than the right of appeal, the judgment, as soon as entered, read, and signed in open court is final, and may be enforced by appropriate writ according to its terms."

In explanation of post-judgment proceedings, the Supreme Court in Rooker v. Fidelity Trust Co., 198 Ind. 207, at page 212, 151 N.E. 610, at page 612 (1926), said:

"It is settled by authority, that after a final decree upon a trial of the merits of the case, by which the rights of the parties are settled, such further orders or decrees that may be necessary will be made to carry into effect the very rights decided upon the trial of the merits of the case, and that court will hear and determine and establish by order or decree anything necessary, that may be auxiliary to, or in execution of, the final decree on the merits."

"We are very loth, as a rule, to question the constitutionality of a statute which has been deliberately enacted by the General Assembly, and has obtained the sanction of executive approval. We do not question, but we recognize with pleasure, the ability, the intelligence, the learning and the faithfulness to duty of the distinguished citizens who are chosen by the people, from time to time, to fill the legislative and executive departments of our State government. They, like the judges of our courts, are bound by their official oaths to support the constitution of the State."

And, further, at page 412,

"In what we have said, we do not question the power of the Legislature to enact general laws, regulating the practice in courts of justice, which may materially affect or change the decision of causes pending before the courts. *But it seems to us, that it is not within the power of the Legislature, by a special act, directed to a particular case then pending before the courts, to change the decision of that case.* Special legislation on such subject is prohibited by sections 22 and 23 of the fourth article of the constitution of this State." (Emphasis supplied.)

This precedent has been followed in Searey v. The Patriot & Barkworks Turnpike Co. et al., 79 Ind. 274 (1881), and Citizens State Bank of Carmel v. Perisho, 77 Ind. App. 70, 130 N.E. 857 (1921).

In *Searey* the Supreme Court, at pages 279-280 of 79 Ind., said:

"Without any extended examination or discussion of the question, we may say generally that we are of the opinion that the appellees, and especially the turnpike company, were bound and concluded by the judgment and decree of the court below, in the former suit, from enforcing the collection of said assessment of benefits, or any part thereof, from the appellants and their co-plaintiffs, or either of them, or from the property of either of them, until such judgment and decree were set aside, annulled or reversed, by due course of law. *It was*

not in the power of the General Assembly, while said judgment and decree remained in full force, to virtually dissolve and set aside the perpetual injunction thereby granted, and to authorize the collection from the appellants of the assessment of benefits, which, a court of competent jurisdiction had declared to be illegal and invalid. Columbus, etc., R. W. Co. v. Board, etc., 65 Ind. 427, on page 440, and cases cited." (Emphasis supplied.)

Collaterally, in Henderson, Auditor of State v. State ex rel. Moon, 58 Ind. 244 (1877), our Supreme Court held that where a controversy had *not* been reduced to judgment at the time the Legislature acted, jurisdiction was lost.

Relating the foregoing authorities to the instant case, the following analysis is required:

Plaintiff, Mass Transportation Authority of Marion County, Indiana, obtained, in this court, a judgment. Such judgment was entered of record on December 31, 1968. The effect of that judgment was to settle the respective interests of the parties to the suit. Subsequently, the General Assembly passed House Enrolled Act No. 1115 (Acts 1969, ch. 26), which we have just held was a legitimate exercise of legislative power. However, the application of House Enrolled Act No. 1115 with respect to the judgment in favor of the Mass Transportation Authority of Marion County, was invalid.

See: The Columbus, C. & I. C. R. W. Co. v. Board of Com'rs of Grant County, et al., *supra*; Searcy v. Patriot & Barkworks Turnpike Co., *supra*.

[9] To hold, as defendants urge, that the Act (House Enrolled Act No. 1115) prevailed in its application as to the judgment in favor of Mass Transportation Authority of Marion County would deprive the Mass Transportation Authority of its judgment by legislative action. The General Assembly cannot interfere with a judicial determination. Article 3, § 1, of the Constitution of the State of Indiana. Without a doubt, the General Assembly had every right to give prospective and retroactive effect to their leg-

islation, with the exceptions heretofore pointed out. However, the attempt to encroach upon the determination of a co-equal branch of government was an unwarranted and unconstitutional action by the General Assembly, and its application to the judgment of this court has no force and effect. It should be abundantly clear that this court has no intention of sacrificing that which the Constitution of this State guarantees to the judicial branch of government.

The court would emphasize that the application which it makes in this case with reference to the retroactive repealer applies only to this case and should not be construed as applying to any other case. This court will make appropriate application of the principles announced here when, and if, cases involving the same are before us.

III. SOVEREIGN IMMUNITY.

[10] Defendants assert in their brief entitled, "Brief in Support of Response to Order of this Court, November 19, 1969.", the following:

> "[T]his action is now an action to extract funds from the state treasury through use of state officers as nominal defendants, the State of Indiana being the real party defendant in interest."

Thus, defendants urge that this action should abate by reason of sovereign immunity.

In support of this proposition defendants cite Ford Motor Co. v. Dept. of Treasury of State of Ind., 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1944). Although the *Ford* decision held that where a money judgment is sought from a "subdivision" or "agency" or "department" of the State, and the State is the real party in interest, it is entitled to invoke its sovereign immunity, the United States Supreme Court stated that the court must look to the nature of the suit to determine whether it has been instituted against the State or against the individual officer. It is apparent from a review of the *Ford* decision that federal jurisdiction was predicated on an alleged violation of the 14th Amendment and the Commerce Clause of the Constitution of the United

States. The action was dismissed by the Supreme Court under the provisions of the 11th Amendment to the Constitution of the United States. The *Ford* decision is in no way binding upon this court in the instant case.

Reviewing the facts before us, there are a number of reasons for refusing to accept the defense of sovereign immunity.

In Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1 (1912), our Supreme Court upheld most forcefully the right of the judicial branch to review the acts of the legislative and the executive to determine their constitutionality. This rationale is highly persuasive. It would be entirely illogical for one branch of government to exceed its constitutional authority and then declare its immunity from judicial review by reason of sovereign immunity. The *Ellingham* case is directed expressly to the ministerial functions of State officials which are governed by the Constitution or statutes.

Another argument in direct answer to the defense of sovereign immunity is based on the language of the removal statute itself. The statute indicates that it is specifically directed to actions of *public officials*, and not the State. The statute did not contemplate the State as a party to the action, and *ipso facto* the defense of sovereign immunity is not available.

---

[7] "Original jurisdiction to restrain or enjoin any *public official*, from doing any act authorized by any act of the general assembly and to mandate any *public official* to do any act prohibited by any act of the general assembly is hereby conferred on the Appellate Court of Indiana. Said jurisdiction shall be invoked by the attorney-general's removal, pursuant to this act [§§ 3-2121—3-2131], of an action from the court in which it is filed, and thereafter the Appellate Court of Indiana shall have jurisdiction of all further proceedings in any case so removed. This grant of jurisdiction shall carry with it complete jurisdiction to hear and determine the entire action in which such relief is demanded; but if it appears to the Appellate Court of Indiana that there is no equity in the demand for injunctive or mandatory relief against any *public official*, the suit shall be dismissed with out prejudice as to the other relief demanded, or it may be remanded to the court from which it was removed, without making any adjudication not necessary to the denial of injunctive or mandatory relief." (Emphasis supplied.) Section 3-2121, *supra*.

The *waiver* theory is also persuasive. It would be at best unfair to permit the State to simply await the outcome of litigation and, if favorable, abide by it, and, if not assert sovereign immunity as a belated defense.

In State ex rel. v. Smith, 85 Ind.App. 56, at pages 61 62, 152 N.E. 836, at page 838, (1926), this court noted the following:

> "The state is the party and the auditor the relator. Under the circumstances of this case there was no offense, against the sovereign power of the state in making it a party to the action. Hogston v. Bell (1916), 185 Ind. 536, 112 N.E. 883. Having provided, as a means of collection, that its debt might be collected by the usual procedure of foreclosure in the circuit court, if appeared to this action, and without a suggestion that it might not be sued herein, it answered in denial and affirmatively, and filed a cross complaint, asking affirmative relief, thereby, by fair implication, consenting that it might be made a party to determine the priority of its lien, or as to whether its judgment had been satisfied in such foreclosure proceeding."

Notwithstanding the cogency and application of all of the above theories, the fact remains that, in the view of this court, the defense of sovereign immunity is simply not applicable in this case. Ellingham v. Dye, *supra*.

IV. SEPARATION OF POWERS.

[11] Defendants have generally raised the question of separation power because of what they allege is "* * * an attempt [by this court] to interfere with and direct the financial policy of the State of Indiana contrary to Article 3, § 1 of the Indiana Constitution."

[12] Such an evaluation of determinations and orders of this court is wholly erroneous. It is the proper and legitimate function of any court to authorize execution on its judgments. To deny it this right would be to deny the existence of the judicial branch of government. Rooker v. Fidelity Trust Co., *supra*.

Sitting as a trial court, this court has interpreted the law. From that interpretation as it applies to House Enrolled Act No. 1818, certain duties and responsibilities devolve upon certain public officials. The substance of these duties was created by the Legislature, not this court. The responsibilities established were created by the Legislature, not this court. The method of appropriation of funds under the Act was designed by the Legislature, not this court. To allege, in spite of these known facts, that this court is attempting to interfere with financial policy, is to exhibit a fearful lack of knowledge of law and its workings.

For a full understanding of the order of payment entered simultaneously with this opinion, the court deems it necessary to consider the constitutional and statutory provisions pertaining to appropriation and payment of State revenues.

Article 10, § 3, of the Constitution of Indiana reads as follows:

"No money shall be drawn from the Treasury, but in pursuance of appropriations made by law."

House Enrolled Act No. 1818, which became law in spite of the unconstitutional pocket veto, as determined by our judgment in this cause, complies with the requirements of Article 10, § 3, *supra*.

[13, 14] House Enrolled Act No. 1818 is in the strictest sense a revenue allocation amendment which provides for the allocation of revenues collected under the Inheritance Tax Act. (Acts 1931, ch. 75, as amended.) An *allocation* by law is an *appropriation* of revenues. See: Carr, Auditor et al. v. State ex rel. Coetlosquet, 127 Ind. 204, 26 N.E. 778 (1890). The fact is that House Enrolled Act No. 1818 simply amended the proportions to be allocated, but the procedure of allocation and appropriation remained essentially the same.

In Carr, *supra*, at page 210 of 127 Ind., page 780 of 26 N.E., our Supreme Court held that an appropriation can be implied from the circumstances and, further, quoted favorably from a California case (McCauley v. Brooks, 16

Cal. 11), to the effect that the funds, when appropriated, need not be in the treasury.

See also: Henderson, Aud'r. v. Board of Comm'rs of State Solders', etc., Monument, 129 Ind. 92, 28 N.E. 127; 13 L.R.A. 169 (1891);

Orbison v. Welsh, Governor et al., 242 Ind. 385, 179 N.E.2d 727 (1962).

There is no apparent limitation on the rule; and the appropriation, once made, is sufficient to authorize money to be drawn from the treasury under the Constitution. The language of House Enrolled Act No. 1818 expressly makes an appropriation and the constitutional requirement is met.

Article 6, § 1, of the Constitution of Indiana provides simply that the Auditor and Treasurer of the State "* * * shall perform such duties as may be enjoined by law; * * *."

1 R.S.1852, ch. 7, § 2, p. 146, Ind.Stat.Ann. § 49-1702, Burns' 1964 Repl., sets out the duties of the Auditor of State. Paragraph "Eighth" of the Act reads as follows:

> "Draw warrants on the treasurer for all moneys directed by law to be paid out of the treasury to public officers, or for any other object whatsoever, as the same may become payable, and every warrant shall be properly numbered."

Again, there appears no limitation on the ministerial obligation of the Auditor, once the money is "* * * directed by law to be paid out * * *" to draw a warrant on the Treasurer.

[15] Paragraph "Fifth" of this Act (§ 49-1702, *supra*) referring to examination and liquidation of claims against the State as cited by the defendants, is *not* applicable where, as here, the "claim" is for enforcement of a *valid* legislative enactment containing an *appropriation* and allocation of inheritance tax revenues.

Acts 1859, ch. 138, § 8, p. 227, as amended by Acts 1937, ch. 168, § 1, p. 873, Ind.Stat.Ann., § 49-1810, Burns' 1964 Repl., reads as follows:

"The auditor of state shall at no time draw a warrant upon the treasurer of state [1] *unless there be money in the treasury belonging to the fund upon which the same is drawn to pay the same*, [2] *and in conformity to appropriations made by law*, and [3] *on money actually in the treasury, subject to the payment of the same*; and the auditor of state shall enter upon his books the number, date, payee, and amount of every draft in favor of the treasurer of state, and properly charge and credit the same to the appropriate fund, so as to keep an exact debit and credit account with each particular fund in the treasury; and the auditor shall carefully file and preserve such claim as his voucher for issuing the warrant." (Emphasis and numbering supplied.)

Under the foregoing provision, the Auditor is confronted with three limitations on the ministerial function of drawing a warrant.

Acts 1931, ch. 75, § 14, p. 192, as last amended by Acts 1957, ch. 318, § 6, p. 936, Ind.Stat.Ann., § 7-2414, Burns' 1969 Cum. Supp., provides as follows:

"Each county treasurer shall make a report, under oath, to the state board of tax commissioners on the first days of January, April, July and October, of each year, of all taxes received by him in the three [3] months next preceding under this act [§§ 7-2401—7-2411, 7-2412a—7-2442], in resident decedents' estates, and credited to the state of Indiana, stating for what estate and by whom and when paid. The form of such report shall be prescribed by the state board of accounts. At the same time the county auditor shall issue his warrant payable to the treasurer of state for such inheritance taxes, interest and penalties as are due the state of Indiana complying with the provisions of section 7 [§ 7-2407] of this act, which warrant shall be stamped and countersigned by the county treasurer as required by law and transmitted to the state board of tax commissioners with his said report. The secretary of the board shall receipt and account for all warrants collected under the provisions of this act *and shall deposit the same when received with*

the state treasurer in a special account to be created and known as the Inheritance Tax Account. Quietus shall be issued by the auditor of state to the state board of tax commissioners at the close of each month upon terms and conditions established for similar boards or commissions. It shall be the duty of the state board of tax commissioners to audit the reports provided for by this section. Shortages, as disclosed by said audit, shall be reported to and promptly covered by county treasurers and auditors concerned by issuance of warrants for the balance due. Excess payments as disclosed by the audit of reports shall be refunded by the board in the manner set out in section 17 [§ 7-2117] of this act and not paid into the state board of tax commissioners. For all such taxes collected by a county treasurer and not paid into the state board of tax commissioners within thirty [30] days from the time herein required, he shall pay interest at the rate of ten [10] per centum per annum, for which he shall be personally liable." (Emphasis supplied.)

Acts 1925, ch. 28, § 1, p. 69, Ind.Stat.Ann., § 61-202, Burns' 1961 Repl., reads, in pertinent part, as follows:

"From and after the first day of October, 1925, in addition to the revenue which accrues to and is a part of the general fund of the State, as now provided by law, the general *fund* of the state shall consist of:

. . . . . .

"Seventh. All inheritance taxes collected under and pursuant to law." (Emphasis supplied.)

[16] The foregoing statutory provisions mandate the following procedure: All inheritance tax revenues are placed in the Inheritance Tax Account which is maintained as part of the general fund. The monies are then appropriated according to the allocation schedule contained in House Enrolled Act No. 1818.

It is apparent that two of three limitations on the Auditor's ministerial duty to issue a warrant established in § 49-1810, *supra*, are not problematical here for the following reasons:

1. The fund (the general fund) exists; and
2. The appropriation was made by law through House Enrolled Act No. 1818, as judicially determined by this court.

The third element necessary for the Auditor to perform the ministerial function is that there be "* * * money actually *in the treasury* subject to the payment of the same; * * *." (§ 49-4810, *supra*) (Emphasis supplied.)

[17] According to the statutes set out above, and the interpretation of their provisions as herein set forth, if the general fund, into which inheritance tax revenues are placed, has sufficient monies to pay the amount allocated by the Act of the General Assembly, then the Auditor is bound by law to draw a warrant for that amount on the Treasurer of State, who is bound by law to honor it.

We are aware of the complexity of the issues involved in this appeal and the official and public concern which has developed as a result of the judgment entered. For that reason we have made every effort to give full hearing to the issues raised by both sides to this controversy.

[18] It is fundamental to the continued existence of our constitutional form of government that controversies such as this be met within prescribed legal procedures, and that the traditional constitutional powers granted to the several branches of government be maintained separate and exclusive. It is not within the scope of the powers granted to the executive branch of government that it should sit as a super-judiciary to decide which laws and judicial determinations it will obey and which it will not. To hold otherwise, would be to deny meaning to the words of Article 3, § 1 of the Constitution of Indiana, which reads:

"The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; *and no person, charged with official duties under one of these departments, shall exercise any of the functions of another,* except as in this Constitution expressly provided." (Emphasis supplied.)

The defendants have, by oath, declared their willingness to obey and uphold the Constitution of this State, and that includes the protection of the doctrine of separation of powers.

In Ellingham v. Dye, *supra*, at page 408 of 178 Ind., page 27 of 99 N.E., Judge Cox, speaking for our Supreme Court, eloquently expressed the constitutional philosophy which binds us all:

"It is a part of appellant's contention that, as the general rule is that courts will not issue writs that are unavailing, injunction should not be decreed in this. For it is assumed by counsel that, the Governor being invested by the Constitution with supreme executive authority with control over the military forces of the state, the courts could not enforce the decree against the board of which the law makes him a member if he chose to disregard it. This consideration presents no reason for the court to refuse to exercise jurisdiction. It surely does not follow that compulsory action would be needed in aid of the writ. This is a government of laws, and all are amendable to it. To the courts the people have given the power, and charged them with the duty to declare what it is; and this duty cannot be lightly disregarded, however unpleasant and embarassing it may be. Without the aid of sword or purse, courts have met with little difficulty from disobedience of their decrees, and this has come equally from a generally conscientious discharge of duty by the courts and a respect for the law which is inherent in our people. Where the question presented to a court is a judicial question, it would be sheer, inexcusable cowardice and a violation of duty for it to decline the exercise of its jurisdiction because of a lack of power to enforce its decree if other agencies of government should refuse to comply with it. Moreover, we have no right to reflect on any officer of a co-ordinate department by entertaining the assumption that the law as declared by the courts, might be disregarded."

WHITE, J., not participating.

PFAFF, Chief Justice.

ORDER

It appearing to this Court that pursuant to Order of the Court made and entered on November 19, 1969, James O. Mathis, as Commissioner of the Indiana Department of State Revenue and Richard A. Green, as Inheritance Tax Administrator of the State of Indiana, did on the 20th day of November, 1969, file with the Clerk of the Supreme and Appellate Courts duplicate certified computations of the amounts deposited by Marion County, Indiana, in the Indiana Inheritance Tax Account of the General Fund of the State Treasury for the calendar years 1967 and 1968.

It further appearing that plaintiff, State of Indiana, on the relation of The Mass Transportation Authority, of Greater Indianapolis, a municipal corporation, did on December 2, 1969, file its Answer to Response to Order of This Court—November 19, 1969, which Answer accepts as true the certified computation hereinabove mentioned.

It is therefore ordered, adjudged and decreed that the Clerk of the Supreme and Appellate Courts transmit *instanter* a copy of said certified computation to Trudy Slaby Etherton, Auditor of the State of Indiana.

It is further ordered, adjudged and decreed that the said Trudy Slaby Etherton, Auditor of the State of Indiana, on or beforce December 22, 1969, draw and issue a warrant upon the General Fund of the Treasury of the State of Indiana for a sum equal to ninety percent (90%) of the amount so computed and certified and that she immediately present and deposit said warrant with the Clerk of the Supreme and Appellate Courts.

It is further ordered, adjudged and decreed that John K. Snyder, Treasurer of the State of Indiana, honor said warrant when called upon to so do.

It is further ordered, adjudged and decreed that the Clerk of the Supreme and Appellate Courts shall, upon receipt of said warrant, disburse the same as follows:

1. Said amount so deposited with the Clerk of the Supreme and Appellate Courts of Indiana shall be disbursed

by said Clerk to The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, less the amount to be disbursed to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, in satisfaction of an attorneys' lien filed by said attorneys for the plaintiff on February 28, 1969.

2. The Clerk of the Supreme and Appellate Courts shall, upon receipt of the warrant representing ninety percent (90%) of State Inheritance Taxes remitted to the Indiana Department of State Revenue, Inheritance Tax Division, from Marion County, Indiana, which were deposited in the "Inheritance Tax Account" of the State Treasury for the period January 1, 1967, through and including December 31, 1968, disburse ten percent (10%) of said funds so remitted for the period beginning January 1, 1967, to and including December 31, 1967, to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, which ten percent (10%) disbursement is in satisfaction of an attorneys' lien filed by the attorneys of record for the plaintiff herein on February 28, 1969.

It is further ordered, adjudged and decreed that a copy of this Order be served upon John K. Snyder, Treasurer of the State of Indiana; upon Trudy Slaby Etherton, Auditor of the State of Indiana; and upon Kendal E. Mathews, Clerk of the Supreme and Appellate Courts, by the bailiff of this court.

WHITE, J., not participating.

Appendix B1

STATE of Indiana on the relation of the MASS TRANSPORTATION AUTHORITY OF GREATER INDIANAPOLIS, A Municipal corporation, Plaintiff,

v.

INDIANA REVENUE BOARD, Roger D. Branigin, as a Member of the Indiana Revenue Board, John K. Snyder, Treasurer of State of Indiana, and as a Member of the Indiana Revenue Board, John P. Gallagher, Auditor of State of Indiana, and as a Member of the Indiana Revenue Board, Indiana Department of State Revenue, William L. Fortune, as Commissioner of the Indiana Department of State Revenue, the State Board of Tax Commissioners, Larry R. Mohr, Herbert C. Holmes, as Members of the State Board of Tax Commissioners of Indiana, T. Michael Smith, as Inheritance Tax Administrator, Defendants.

No. 767 A 39.

Appellate Court of Indiana.

En Banc.

Dec. 31, 1968.

Transfer Denied Feb. 6, 1969.

See 244 N.E.2d 111.

Original action to mandate members of revenue board and other officials to comply with statute pertaining to distribution of inheritance tax funds. The Appellate Court, Cooper, J., held that where bill containing emergency clause was properly authenticated by presiding officers of House and Senate and was presented to Governor on last day of legislative session and Governor failed to file same within five days with Secretary of State together with his objections thereto, bill became law without Governor's signature.

Judgment for plaintiff.

Faulconer, Bierly and Prime, JJ. dissented.

1. Statutes⇨34

Governor has no power to pocket veto legislation which has been enacted by the General Assembly.

2. **Constitutional Law** ⇨**45**

Courts may not ignore open and flagrant violation of constitutional provisions by those sworn to uphold and defend it.

3. **Statutes** ⇨**176**

Court in determining whether or not bill became law has duty to examine all sources of information which would clarify factual situation concerning the bill.

4. **Statutes** ⇨**34**

Bill providing for distribution of inheritance tax funds, which had emergency clause and which was properly authenticated by presiding officers of both House and Senate and which was presented to governor on last day of legislative session and which governor failed to file with Secretary of State together with his objections within five days became law without governor's signature. Laws 1967, House Enrolled Act No. 1818; Burns' Ann.St. § 7-2436; Laws 2nd Spl.Sess. 1965, c. 7; Const. art. 5, § 14.

5. **Statutes** ⇨**34**

When bill is received by governor, but not signed by him, nor vetoed and returned to House in which it originated, bill, when it contains emergency clause, will go into effect immediately after lapse of five-day period unless governor shall file such bill, with his objections thereto, in office of Secretary of State. Laws 1967, House Enrolled Act. No. 1818; Burns' Ann.St. § 7-2436; Laws 2nd Spec.Sess. 1965, c. 7; Const. art. 5, § 14.

6. **Courts** ⇨**100(1)**

Judicial decision concerning validity of procedure for enacting bills into law would not be given retrospective effect.

John Neff, Richard M. Givan, Indianapolis, for plaintiff, Lieber & Neff, Bowen, Myers, Northam & Givan, Indianapolis, of counsel.

John J. Dillon, Atty. Gen., Charles S. White, Chief Counsel, Indianapolis, Virginia D. McCarty, Deputy Atty. Gen., for defendants.

ORIGINAL ACTION

COOPER, Judge.

From the record now before us, it appears that the plaintiff filed a petition in the Superior Court of Marion County, Room No. 3, to mandate the defendants to comply with House Enrolled Act No. 1818, passed by the General Assembly during its 1967 Session. Specifically, the petition prayed that:

> "An order issued against Defendants, mandating them to administer and enforce the inheritance tax laws of Indiana as they now exist including the Acts of the General Assembly of Indiana, 1931, Chapter 75, Section 36, as amended by the 1967 General Assembly.
>
> "Plaintiff further prays that an order issued against Defendants, enjoining them from continuing to apply the taxes levied and collected under the inheritance tax law of Indiana according to the Acts of the General Assembly of Indiana, 1931, Chapter 75, Section 36, as it existed prior to its amendment by the 1967 Indiana General Assembly."

The trial judge granted a temporary restraining order. The Attorney General on behalf of the defendants, prior to the hearing date set by the Superior Court of Marion County, filed a petition to transfer the cause to this Court pursuant to Ch. 7, of the Acts of 1965, (2nd Spec.Sess.). After a hearing by this Court, sitting In Banc, on the petition to transfer, we assumed jurisdiction and transferred the cause to this Court and dissolved the existing restraining order.

The Attorney General, on behalf of the defendants, filed a demurrer to the complaint on the ground that it failed to state a cause of action. Subsequently we overruled the de-

murrer. Thereafter, both parties filed separate motions for judgment on the pleadings.

The sole question now before us to be decided is whether House Enrolled Act No. 1818 became the law of the State under the following circumstances.

House Enrolled Act No. 1818 amended Acts of 1931, Ch. 75, as amended, and Acts of 1947, Ch. 10, and provided for the distribution of inheritance tax funds on the basis of ten percent (10%) to the State and ninety percent (90%) to the Mass Transportation Authority of Marion County, the plaintiff herein.

If the bill became law, the relief prayed for in the petition should be granted. If it did not become law, judgment should be entered for the defendants.

The facts in this cause are undisputed and without conflict. The bill in question was duly passed in both Houses of the 115th General Assembly; duly signed by the respective officials of both the Senate and the House and presented to the Governor, with other bills, whose office gave a receipt therefor. This presentment was made on the last day of the 1967 legislative session. The Governor did not approve the bill by signing it and sending it to the office of the Secretary of State, nor did he send it to the office of the Secretary of State unsigned, nor did he return it with his objections thereto, as provided in Article 5, Section 14, of the Constitution of Indiana. Therefore, the bill was neither published nor distributed to the Clerks of the Circuit Courts of the several counties of the State by the Secretary of State with other bills.

It is agreed by all concerned that the bill is still in the Governor's office. Plaintiff contends that this bill became law after five days since it contained an emergency clause, pursuant to Article 5, Section 14 of the Constitution of Indiana, and the defendants contend that it did not, citing the last sentence of Article 5, Section 14.

Article 5, Section 14 of the Constitution of the State of Indiana reads as follows:

"§ 14. Bills signed or vetoed.—Every bill which shall have passed the General Assembly, shall be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the House in which it shall have originated; which House shall enter the objections, at large, upon its journals, and proceed to reconsider the bill. If, after such reconsideration, a majority of all the members elected to that House shall agree to pass the bill, it shall be sent, with the Governor's objections, to the other House, by which it shall likewise be reconsidered; and, if approved by a majority of all the members elected to that House, it shall be a law. If any bill shall not be returned by the Governor within three days, Sundays excepted, after it shall have been presented to him, it shall be a law, without his signature, unless the general adjournment shall prevent its return; in which case it shall be a law, unless the Governor, within five days next after such adjournment shall file such bill, with his objections thereto, in the office of Secretary of State; who shall lay the same before the General Assembly at its next session, in like manner as if it had been returned by the Governor. But no bill shall be presented to the Governor, within two days next previous to the final adjournment of the General Assembly."

The citizens of our State generally recognize, and our Courts judicially know, that the legislative and the executive branches of our state government have, for a period of years, disregarded the clear mandate of the Constitution which is the organic law of this State, concerning how bills passed by the General Assembly are to become law. We feel that the time has come for the judiciary to recognize and denounce this manifest departure from the mandates given to the legislative and executive branches of our government by our Constitution.

We judicially know that the Constitution of Indiana, in Article 5, Section 14, provides:

"no bill shall be presented to the Governor, within two days next previous to the final adjournment of the General Assembly."

We also judicially know that the common practice has flourished of presenting important and vital bills to the Governor within the last two days of the session, contrary to the constitutional prohibition, and that several of the recent governors have accepted such bills within the last two days of such sessions and in most cases acted upon such bills in the method provided by the constitution, and further, that bills have been presented after the legislature should have adjourned sine die within the term required by the constitution of the State of Indiana.

[1] Likewise, we also judicially know that for years, the executive branch of our state government has illegally and unlawfully pocket vetoed various bills which have been duly enacted by the legislature. For example, the legislative journals show that in the year 1965, there were 19 House and 10 Senate bills pocket vetoed; that in 1967, there were 14 House and 19 Senate bill pocket vetoed. There is no authority, either from the Constitution, or from a Supreme Court decision interpreting our Constitution, which gives the Governor the power to pocket veto legislation which has been enacted by the General Assembly.

We further judicially know that one of the greatest students of constitutional law that was ever privileged to sit on the Supreme Court of Indiana, the late Justice Gilkison, questioned the authority of the legislature to stop the clocks in the respective chambers of each house on the last day of each session, in his dissenting opinion in the case of State ex rel. Cline v. Schricker (1949) 228 Ind. 41, at page 49, 88 N.E.2d 746, 89 N.E.2d 547.

Thomas Paine in 1791, defined and explained a constitution of a republic thus:

> "A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and whatever it cannot be produced in visible form, there is none. A constitution is a thing antecedent to government, and a government is only a creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government. It is the

body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by what other name such bodies may be called; *the powers which the executive part of the government shall have;* and, in fine, everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound. A constitution, therefore, is to a government, what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made; and the government is in like manner governed by the constitution."

[2] These same principles also apply today to our own state Constitution. When we, as Judges of an appeal court, have before us a case such as this, in which it appears that those in power, after having sworn to uphold and defend the Constitution have openly and flagrantly violated its provisions, we must not ignore such illegal actions and remain silent, for to do so would thereby condone such behavior, and we would be betraying the citizens whose rights and privileges under the Constitution we have sworn to protect.

If the Courts as the guardians of the rights guaranteed to the people by the constitution should ever relax their vigilance in enforcing the provisions of the Constitution and yield to the pressures of any groups having special interests, including officeholders in the legislative and executive branches of government, our present system of constitutional government would collapse.

In the volume, Constitutional Limitation, by Cooley, 8th Edition, Volume 1, page 355, Cooley makes the following statement concerning state constitutions:

"That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law."

On page 81 of the same volume, we find the following statement:

"By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law."

Article 5, Section 14 of the Constitution of Indiana prescribes the duties of a Governor relating to all bills passed by the General Assembly that are received by him, regardless of when so received. It is to be noted that the Constitution does not prohibit the Governor from acting upon any bill received by him during the session. It necessarily follows that after the Governor receives any bill during the session, he must act upon it in one of the ways provided for by the Constitution, as hereinabove set forth.

The Constitution expressly states that if adjournment shall prevent the bill's return to the General Assembly, "it shall be a law, unless the Governor, within five days next after such adjournment, shall file such bill, with his objections thereto, in the office of Secretary of State."

It was stated in Opinions of the Attorney General, 1935, at pages 87 and 88 as follows:

"III.

"The Governor has five days next following the final adjournment of the General Assembly within which to consider and act upon enrolled bills presented to him on Monday, March 11, 1935. This is in accordance with the provisions of section 14 of Article 5 of the Constitution of the State of Indiana.

"IV.

"Enrolled bills presented to and duly received and receipted for by the Governor on either Saturday, March 9, 1935, or Monday, March 11, 1935, will become a law without the signature of the Governor unless the Governor shall sign the same or refuse to sign and file such

enrolled bill with his objections thereto with the Secretary of State within the five days next after the final adjournment of the Seventy ninth session of the General Assembly." (Author's note: A review of the legislative journal for 1935 shows that March 11, 1935, was the last day of the session.)

It has been held also that where an act is not approved by the Governor and the same takes effect by lapse of time by reason of his failure to return the same with his objections thereto, such Act, when it contains an emergency clause, as does House Enrolled Act No. 1818, the Bill we are now considering, will go into effect immediately upon the expiration of time given by the Constitution for the Governor to consider and return bills. Constitution of the State of Indiana, Article 4, Section 28; State ex. rel. White v. Grant Superior Court, et al., (1930) 202 Ind. 197, 211, 172 N.E. 897, 71 A.L.R. 1354; Staleup et al. v. Dixon, 136 Ind. 9, 35 N.E. 987; State of Indiana ex rel. Colbert v. Wheeler, 172 Ind. 578, 89 N.E. 1, 19 Ann.Cas. 834; Shutt v. State of Indiana ex rel. Cain, 173 Ind. 689, 89 N.E. 6.

Our Supreme Court has, in the case of State ex rel. Grant, supra, 202 Ind. at page 240, 172, N.E. 897, held that the last sentence of Article 5, Section 14, is an inhibition only on the legislature and is in no way binding upon the Governor. At no place in the Constitution is the Governor given the authority or power to pocket veto any bill or enactment of the General Assembly presented to him during a session, regardless of the time when it is presented to him.

In interpreting Article 5, Section 14 of our State Constitution, our Supreme Court has expressly stated in the case of Tarlton v. Peggs (1862) 18 Ind. 24, 25, the following:

> *"This provision was intended to prevent the possibility of the Governor withholding a bill and thus preventing its becoming a law."* (Our emphasis)

Also, in the case of State ex rel. White v. Grant Superior Court et al., (1930) 202 Ind. 197, 211 172 N.E. 897, 901 we find the following statement:

"The proceedings by the General Assembly and the actions of the Governor necessary for the passage of a bill and to make it a law are stated in the Constitution. *The necessary procedure, as thus stated by the organic law, may not be enlarged, curtailed, changed, or modified by any governmental authority.*" (Our emphasis)

The Court went on to state further on page 211, 172 N.E. on page 901 of the opinion as follows:

"This bill, after its passage and enrollment and presentation to the Governor, was not delivered by the secretary of state to the state printer, and it was not printed under authority together with the other laws passed by the General Assembly at its Seventy Sixth Session. This bill had in it an emergency clause to the effect that 'the same shall thereafter be in force from and after its passage, etc.' The Constitution by section 28, art. 4, provides that, where an emergency shall be declared in the preamble or in the body of the law, it is unnecessary for it to become a law, that it be published and circulated in the several counties of the state by authority. This section has been plainly interpreted by the court that a bill will become a law at the expiration of the time given to the Governor by the Constitution, to file the bill with the secretary of state, together with his (the Governor's) objections thereon, where the bill provides that an emergency exists for it to become effective upon its passage. State [ex rel.] v. Wheeler (1909) 172 Ind. 578, 588, 89 N.E. 1, 19 Ann.Cas. 834; Shutt v. State [ex rel.] (1909) 173 Ind. 689, 89 N.E. 6."

[3] Under the principles enunciated in the case of State of Indiana ex rel. Colbert v. Wheeler (1909) 172 Ind. 578, 89 N.E. 1, this Court, in determining whether or not the bill became law, had the duty to examine all sources of information made available to us by the parties which would clarify the factual situation concerning this bill. From this information, we find that the Governor accepted House Enrolled Act No. 1818 together with several other House Enrolled Acts which became law with the Governor's signature on the last day of the session. It is, therefore, clearly

established that the Governor did, in fact, accept this group of House Enrolled Acts, including No. 1818, the one in question.

[4] The Constitution does not give the Governor the authority to condifionally accept an act at any time. Therefore, we must hold that House Enrolled Bill No. 1818, which had an emergency clause, which was properly authenticated by the presiding officers of both the House and Senate, and was accepted by the Governor, who failed to file the same within five days with the Secretary of State together with his objections thereto, became the law of the State of Indiana without the Governor's signature. In support of the foregoing statement, see both the majority and the dissenting opinions in the case of Hendricks, Secry. etc. v. State ex rel. Northwest Indiana Crime Commission, Inc. et al., (1946) 245 Ind. 43, 196 N.E.2d 66.

[5] When an Act is received by the Governor, but not signed by him, nor vetoed and returned to the House in which it originated, such Act, when it contains an emergency clause, such as the one we are now considering will go into effect immediately after the lapse of the five day period provided for by the Constitution and become the law, unless the Governor shall file such bill, with his objections thereto, in the office of the Secretary of State.

[6] We are of the expressed view that what we have stated heretofore should have no retrospective effect. To do so, would produce an uncertainty concerning the fundamental law as it has existed in the past. Such uncertainty would no doubt result in utter chaos and confusion as to the validity and effect of past legislation. As a result, we believe that the holding of the case at bar should be applicable to the 95th session of the General Assembly and all sessions thereafter. In re Todd (1934) 208 Ind. 168, 193 N.E. 865; Swank et al. v. Tyndall et al., (1947) 226 Ind. 204, 78 N.E.2d 535; Johnson v. New Jersey (1966) 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882.

The plaintiff's motion for judgment is granted and the defendant's motion for judgment is denied.

Judgment is entered for the plaintiff with costs against the defendants.

CARSON, C. J., COOK, P. J., and PFAFF and SMITH, JJ., concur.

FAULCONER, J., dissents with opinion in which BIERLY and PRIME, JJ., concur.

NOTE: COOK, P. J., participated in the argument and the conferences thereafter and concurred in the majority opinion. His untimely death occurred before the final draft of this opinion was completed and delivered to the Clerk's office.

FAULCONER, Judge (dissenting).

Plaintiff filed a petition in the Superior Court of Marion County, Room No. 3, to mandate defendants to comply with House Enrolled Act No. 1818, passed by the General Assembly during its 1967 Session. Specifically the petition prayed that:

> "[A]n order issue against Defendants, mandating them to administer and enforce the inheritance tax laws of Indiana as they now exist including Acts of the General Assembly of Indiana, 1931, Chapter 75, Section 36, as amended by the 1967 General Assembly.
>
> "Plaintiff further prays that an order issue against Defendants, enjoining them from continuing to apply the taxes levied and collected under the inheritance tax law of Indiana according to the Acts of the General Assembly of Indiana, 1931, Chapter 75, Section 36, as it existed prior to its amendment by the 1967 Indiana General Assembly."

The trial judge granted a temporary restraining order, without notice, hearing or bond. The Attorney General of Indiana on behalf of the defendants, prior to the hearing date set by the Superior Court of Marion County, filed a petition to transfer the cause to this court pursuant to ch. 7 of Acts 1965 (2nd Spec.Sess.). After hearing on the petition to transfer by this court, In Banc, we transferred the cause to this court and dissolved the restraining order.

The Attorney General, on behalf of the defendants, filed a demurrer to the complaint on the ground that it fails to state a cause of action. Subsequently we overruled the demurrer. Thereafter both parties filed separate motions for judgment on the pleadings.

The only question before us in this cause is whether House Enrolled Act No. 1818 became a law.

House Enrolled Act No. 1818, amended Acts 1931, ch. 75, § 36, p. 192, § 7-2436, Burns' 1953 Replacement, and provided that inheritance tax funds should be distributed, 10% to the State and 90% to the Mass Transportation Authority of Marion County, plaintiff herein.

If the bill became law the relief prayed for in the petition should be granted. If it did not become law, judgment should be entered for the defendants.

The facts in this cause are undisputed and without conflict. The bill in question was duly passed in both Houses of the 95th General Assembly; duly signed by the respective officials of both the Senate and the House and taken to the Governor's office on the last day of the 95th Session of the General Assembly with other bills, which office gave an unsigned receipt therefor. The Governor did not approve the bill by signing it and sending it to the office of the Secretary of State, nor did he send it to the office of the Secretary of State unsigned, nor did he return it with his objections thereto, as provided in Art. 5, § 14, of the Constitution of Indiana.

This bill was neither published nor distributed by the Secretary of State to the clerks of the Circuit Courts of the several counties of the State with other bills.

It is agreed by all concerned that the bill is still physically in the Governor's office. Plaintiff contends that this bill became law after five days, pursuant to Art. 5, § 14, of the Constitution of Indiana, and defendants contend that it did not, citing the last sentence of Art. 5, § 14, supra, which reads as follows:

"But no bill shall be presented to the Governor, within two days next previous to the final adjournment of the General Assembly."

This case is governed by State ex rel. Owen v. Fortieth Judical Circuit (1934), 202 Ind. 354, 174 N.E. 423. The facts are strikingly similar and are set out at page 356 of 202 Ind., 174 N.E. at page 423, as follows:

"Senate bill No. 165 was passed by both houses and was properly signed by the presiding officer of each. On March 11, 1929 at 4:40 p. m. upon request of the Governor, the secretary of the senate delivered said bill to the office of the Attorney General for his opinion touching the legality thereof. That thereafter between 5 p. m. and 7 p. m. said senate bill No. 165 was, at the request of the Governor, delivered to the office of the Governor, and the Governor talked with various persons who were interested in said bill concerning the same.

"The final adjournment of the Seventy-Sixth Session of the General Assembly occurred at 12 midnight March 11, 1929.

"Said bill did not contain any emergency clause, neither was it published nor distributed to the clerks of the circuit courts of the several counties of the state, or declared by the Governor to be in effect as required by section 28, article 4, State Constitution, section 131 Burns' Ann.St. 1926, and section 246 Burns' Ann.St. 1926.

"Said Senate bill No. 165 was never approved by the Governor, neither was it returned with his objections. The bill was retained by the Governor and is still in his office."

Further, the court, in holding that the bill did not become law stated, at page 358 of 202 Ind., 174 N.E. at page 424, as follows:

"The bill here in question was presented or attempted to be presented to the Governor between 5 and 7 o'clock p. m. on the last day of the session. No official action was taken by him, neither was there any obligation imposed upon him to act, as the bill was not presented to him more than two days next previous to the final adjournment of the General Assembly. We therefore conclude that relatrix' petition for an alternative writ of mandate is insufficient and respondents' demurrer thereto should be sustained."

Plaintiff points out that House Enrolled Act No. 1818 contained an emergency clause and, therefore, became law at the expiration of five days, and cites State ex rel. White v. Grant Superior Court (1930), 202 Ind. 197, 211, 172 N.E. 897, 902, wherein the court stated that Art. 4, § 28 of the Constitution of Indiana provides that "where an emergency shall be declared in the preamble or in the body of the law, it is unnecessary for it to become a law that it be published and circulated in the several counties of the state by authority", and that "[t]his section has been plainly interpreted by the court, that a bill will become a law at the expiration of the time given to the Governor by the Constitution to file the bill with the Secretary of State, together with his (the Governor's) objections thereon, where the bill provides that an emergency exists for it to become effective upon its passage." However, in State ex rel. White v. Grant Superior Court, supra, the court determined that the bill was presented to the Governor on Saturday preceding the Monday the Legislature adjourned, and the court held Sunday was not excluded in determining the days. Therefore, the *Grant* case is not authority for the proposition of plaintiff that the emergency clause made the law effective after the expiration of five days.

The emergency clause would not have made House Enrolled Act No. 1818, presented to the Governor during either of the last two days of the session and retained by him without any further action on his part, a law by mere lapse of time. Such a clause serves merely to make law, properly presented under Art. 5, § 14 of the Constitution of Indiana, effective without publication.

"The last sentence of the same section, the one under consideration, applies only to the General Assembly, and is in no way an inhibition to the Governor to receive a bill if sought to be presented to him by the General Assembly, but has to do only as an inhibition and a restraint of power upon the General Assembly." State ex rel. White v. Grant Superior Court, supra. (1930), 202 Ind. 197, 210, 172 N.E. 897, 901.

To ignore the clear and plain language of the last sentence of Art. 5, § 14, supra, would be contrary to the well established fundamental rules of constitutional construction that no word or words shall be assumed to be mere surplusage.

I cannot agree that, the decision of our Supreme Court in Hendricks, Secry. etc. v. State N. W. Crime Comm. (1964), 245 Ind. 43, 196 N.E.2d 66, is authority for plaintiff's position. A reading of the two majority and one dissenting opinions discloses that said case involved only an interpretation of that part of Art. 5, § 14 of the Indiana Constitution reading "unless the general adjournment shall prevent its return;" and the issue of presentation of a bill "within two days next previous to the final adjournment" was neither raised, briefed, argued or considered by the court. However said decision does indirectly support my position in the present case. In Judge Achor's concurring opinion, at pages 54, 55 of 245 Ind., 196 N.E.2d at page 71 is the following language, "However, the Indiana constitution contains express and explicit provision that (*except as to bills sent to the Governor during the last two days of the session*) all bills passed by the Legislature and presented to the Governor but not signed by him must be returned to the Legislature for reconsideration."

Again, at page 60 of 245 Ind., 196 N.E.2d at page 74, Judge Achor states, "furthermore, any bill which is presented to the Governor (Except within the last two days of the session) must be returned to the next session of the Legislature for its action, notwithstanding the general adjournment thereof."

For the reasons above set forth, it is my opinion that House Enrolled Act No. 1818 did not become law without the signature of the Governor because it was presented, or attempted to be presented, to the Governor within the two-day limitation as set forth in the last sentence of Art. 5, § 14 of the Constitution of Indiana.

Plaintiff's motion for judgment therefore should be denied and defendants' motion for judgment sustained.

Therefore, In my opinion, judgment should be entered for the defendants, with costs against the plaintiff.

BIERLY and PRIME, JJ., concur.

Appendix B2

STATE EX REL. MASS. TRANSP. AUTH. v.
INDIANA REV. BD.
Cite as 244 N.E.2d 111

STATE of Indiana on the relation of the MASS TRANSPORTATION AUTHORITY OF GREATER INDIANAPOLIS, a Municipal Corporation, Respondent,

v.

INDIANA REVENUE BOARD, Roger D. Branigin, as a Member of the Indiana Revenue Board, John K. Snyder, Treasurer of State of Indiana, and as a Member of the Indiana Revenue Board, Indiana Department of State Revenue, of the Indiana Department of State Revenue, the State Board of Tax Commissioners, Members of the State Board of Tax Commissioners of Indiana, T. Michael Smith, As Inheritance Tax Administrator, Petitioners.

No. 767A39.

Supreme Court of Indiana.

Feb. 6, 1969.

Corrected Opinion Feb. 7, 1969.

Action to compel members of revenue board and other officials to comply with statute pertaining to distribution of inheritance tax funds. The Superior Court, No. 3, Marion County, Glenn W. Funk, J., granted a temporary restraining order. The cause was transferred to the Appellate Court which entered judgment for plaintiff, 242 N.E.2d 642. A petition to transfer the cause to the Supreme Court was denied, there not being majority of judges of Supreme Court participating in case in favor of granting petition to transfer.

Transfer denied.

Courts⇐220(20¾)

Petition to transfer cause to Supreme Court would be denied, there not being majority of judges participating in case in favor of granting petition to transfer.

John Neff, Richard M. Givan, Indianapolis, Lieber & Neff, Bowen, Myers, Northam & Givan, Indianapolis, of counsel, for respondent.

John J. Dillon, Atty. Gen., Charles S. White, Chief Counsel, Virginia D. McCarty, Deputy Atty. Gen., Indianapolis, for petitioners.

ON PETITION TO TRANSFER

PER CURIAM.

This action is before this court on petition to transfer from the Appellate Court. HUNTER and ARTERBURN, JJ., believe that transfer should be denied. DeBRULER, C.J., and JACKSON, J., are of the opinion that the transfer should be granted. GIVAN, J., did not participate in this case.

There not being a majority of those judges participating in this case in favor of granting the petition to transfer, it is denied.

Transfer denied.

GIVAN, J., not participating.

HUNTER, Judge.

The respondent filed a petition for a writ of mandate in the trial court to require the petitioners to comply with House Enrolled Act No. 1818 of the 1967 General Assembly. The cause was transferred to the Indiana Appellate Court, State ex rel. Mass Transportation Authority v. Indiana Revenue Board (1968), Ind.App., 242 N.E.2d 642, which entered a judgment for the respondent. The only dispute is as to whether said bill became a law, and, if it did, the judgment of the Appellate Court was correct, and the petition for transfer should be denied.

The bill was duly passed and signed by the proper officials of both Houses of the 95th General Assembly. It was presented to the Governor on the same day that the General Assembly adjourned its 1967 session. The Governor never acted on nor returned the bill to the Secretary of

State, and it has never been published nor distributed to the clerks of Circuit Courts by the Secretary of State. Respondent contends that the bill became law, by the Governor's inaction, five days after the legislature was adjourned. Petitioners contend that the bill did not become law and that the Governor of Indiana has the authority to exercise what is commonly known as a "pocket veto". Both parties agree that the dispute is to be decided by a proper interpretation of Article 5, section 14 of the Constitution of Indiana:

> "§ 14. Bills signed or vetoed.—Every bill which shall have passed the General Assembly, shall be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the House in which it shall have originated; which House shall enter the objections, at large, upon its journals, and proceed to reconsider the bill. If, after such reconsideration, a majority of all the members elected to that House shall agree to pass the bill, it shall be sent, with the Governor's objections, to the other House, by which it shall likewise be reconsidered; and, if approved by a majority of all the members elected to that House, it shall be a law. If any bill shall not be returned by the Governor within three days, Sundays excepted, after it shall have been presented to him, it shall be a law, without his signature, unless the general adjournment shall prevent its return; in which case it shall be a law, unless the Governor, within five days next after such adjournment, shall file such bill, with his objections thereto, in the office of Secretary of State; who shall lay the same before the General Assembly at its next session, in like manner as if it had been returned by the Governor. But no bill shall be presented to the Governor within two days next previous to the final adjournment of the General Assembly."

There are three provisions in the section which are most relevant to a determination of this question and which appear to be in conflict: (1) The requirement that every bill passed by the General Assembly be presented to the Governor, (2) The provision that no bill can be presented to the Governor in the last two days of the legislative session

(with no corresponding restriction on the General Assembly not to enact new legislation during this period), and (3) The provision that, if a general adjournment prevents a bill's return by the Governor, it becomes a law unless the bill and his objections thereto are filed in the office of Secretary of State within five days after the adjournment.

The present conflict is this: how are these three provisions to be applied to bills that are duly passed and authenticated by both Houses during the last two days of a legislative session. If the General Assembly elects to follow the first of these three provisions which directs that all bills, whenever enacted, shall be presented to the Governor, are they not thereby acting inconsistently with the second provision which states that no bills shall be presented to the Governor in the last two days of the legislative session? To make matters worse, suppose the legislature chooses to follow the first mandate, ignore the second, and present the bills to the Governor on the last day of the legislative session. The question then becomes: was there an effective presentment, and, if so, does the bill become law according to the third provision if the Governor fails to act on the bill within the next five days? This is the question facing this Court, and the only conclusion which is apparent from restricting one's view to the literal provisions of the section is that there is an apparent conflict in the language.

In interpreting this section, it becomes necessary for this Court to look to the history of its adoption particularly with a view toward discerning the intentions of the drafters of our present Constitution. This Court in another dispute involving this same section once declared:

> "If the meaning of a constitutional provision is doubtful, courts may examine the proceedings of the convention which framed the provision, to aid in its interpretation." Woessner v. Bullock (1911), 176 Ind. 166, 169, 93 N.E. 1057, 1058.

It seems remarkable that in view of this well-accepted general rule regarding the construction of constitutional provisions that this court has never previously cited nor referred to the proceedings of the constitutional convention

in any case involving the particular provisions here in dispute. For this reason we propose to review the proceedings of the Constitutional Convention of 1850 as regards the adoption of Article 5, section 14.

THE 1850 CONVENTION

The Constitutional Convention of 1850 appointed several committees to do most of its original drafting. Two of the most prestigious of these were the Committee on the Legislative Department and the Committee on the Executive. On October 31, 1850, the Committee on the Legislative Department submitted a proposal designated Section 19, which gave the Governor a veto power and provided that a two-thirds majority of the members of each house present was required to override this veto. The last sentence of section 19 read as follows:

> "If any bill shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, it shall be a law in like manner as if he had signed it, unless the General Assembly, by adjournment, prevent such return, in which case it shall be a law, unless sent back within three days after their next meeting." Journal of the Convention of the People of Indiana (Indiana Historical Collections Reprint, 1936) [hereinafter referred to as Journal] 169.

According to this provision, the Governor was given five days in which to act on a bill or it would become law, and, if, by adjournment of the General Assembly, the Governor was prevented from returning it to the legislature for their reconsideration, he was required to do so within three days of their next session. In any event, the Governor's failure to act would result in the bill's becoming a law. There was no authority granted to the Governor to pocket veto a bill after the General Assembly had adjourned.

A minority report was submitted by certain members of the Committee; the only difference between their proposal and section 19 was that the minority felt that only a simple

majority of all the members of each house should be required to override the Governor's veto. Journal, supra at 170-171. The last sentence of the minority report was identical to the last sentence in the majority report.

On that same day, the same Committee submitted section 20 to the Convention. This provision provided the Governor a veto power over joint resolutions "according to the rules and limitations prescribed in case of bills." Journal, supra at 171.

On the following day, the Committee on the Executive submitted a proposal to the Convention which was designated as section 22. Section 22 was similar to the legislative committee's section 19 and gave the Governor the power to veto a bill. There were two primary differences between the proposals recommended by these two committees:

(1) Section 22, similar to the majority report on section 19, only required a majority of all the members of each house to override a veto, and,

(2) The last sentence of section 22 read as follows:

"If any bill shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law, unless the general adjournment prevents its return: in which case it shall be a law." Journal, supra at 180.

According to this provision, the Governor was required to act on a bill in time to return it to the current session of the General Assembly or it became a law notwithstanding his objections. If the General Assembly adjourned before the Governor had an opportunity to return the bill, he simply lost his power to veto it, and the bill became a law without his signature.

On this same day, the Committee on the Executive submitted section 23 which was identical to section 20 submitted by the legislative committee and gave the Governor the power to veto joint resolutions. Journal, supra at 180.

On December 13, the legislative committee's sections 19 and 20 were given a second reading. At that time, one of the

delegates realizing the duplication that had occurred in the reports of these two committees made the following motion regarding section 19.

> "This section, sir, properly belongs to another article. It belongs to the article reported by the committee on the executive department. This subject was referred to that committee by the Convention, and the committee have reported a sections which will come up for consideration at the proepr time. I therefore move that this section be laid upon the table." 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana (Indiana Historical Collections Reprint, 1935) [hereinafter referred to as Debates] 1127.

Both sections 19 and 20 were tabled by the Convention apparently in deference to the corresponding proposals (sections 22 and 23) that had been submitted by the Committee on the Executive. Journal, supra at 432.

On December 26, section 22 came before the Convention for the second of its three readings. Two proposed amendments to the section were defeated. Then one Mr. Rariden, a delegate from Wayne County, moved to amend the section in a way which would seem to indicate that he had been given an incorrect copy of the committee's proposal. He moved to strike out the word "not" in the last line "so that if the governor were prevented, by the adjournment of the General Assembly, from sanctioning a bill which was sent to him for his signature, it should nevertheless be a law." 2 Debates, supra at 1322. The motion was an anomaly in that the last line of the section, as originally introduced, contained no negative and provided precisely what Mr. Rariden wanted. On the following day, this delegate withdrew his amendment and moved for an amendment which he felt would clarify this last sentence. The last sentence, as he wished to amend it, would have read:

> "If any bill shall not be returned by the Governor within time before the general adjournment for each house of the Legislature to act upon the same, it shall be a law notwithstanding." Journal, supra at 548.

In support of his amendment, Mr. Rariden made the following remarks:

"I desire to have this Convention understand what they are doing. I aver that this section, as it stands, enlarges the veto power four-fold. Let me direct the attention of gentlemen for a moment to what will be the condition of the Legislature hereafter. A section has been reported to us which provides that there shall be but one session in every two years, and we have adopted a section which provides that no law shall pass unless it have the sanction of a majority of all the members elected.

* * * * * * * * * * *

It is proper enough that the Governor should have the power to call upon the Legislature to re-consider a measure that they had passed. It would be but a salutary check upon hasty legislation to require them to reflect upon what they had done. But the provision contained in this section puts it in the power of the Governor to thwart and check the action of the legislative body altogether. * * * It is giving to the Executive the power, practically to defeat the action of the Legislature, and to avoid responsibility. He may keep a bill in his pocket, and he may say 'Oh I have been debating and reflecting upon it, and I cannot make up my mind,' and make out of his very delay an appearance of great regard for the public interest.

* * * * * * * * * * *

It is argued in favor of the section that it is intended to prevent the fraudulent action of members in holding back their measures until too late for the Executive to examine them and return them previous to the adjournment. Sir, if we suppose that the representatives hereafter are to be knaves, and the executive's business is to watch and restrain them; they should be dispensed with, and their functions vested in the Executive; they can be of no other use than to make trouble. Measures so withheld, and from such men, are unworthy of the sanction of the Executive as we may suppose, and must intend some wrong to the public. The hurry and confusion which pre-

vails at the close of the legislature has been hertofore a subject of complaint, and an excuse for Governors exercising the pocket veto; but it grew out of local legislation, a great mass of which was thrown upon the last days of the session.

* * * * * * * * * * *

Sir, I am opposed to it. * * * It will be in the power of the Executive at any time to defeat legislative action by merely keeping a bill in his pocket for more than five days." 2 Debates, supra at 1323 (our emphasis).

Following Mr. Rariden's remarks, several delegates debated the propriety of allowing the executive any veto power at all. Mr. Rariden then attempted to redirect the attention of the convention on his amendment.

"If no one else desires to speak upon the subject, I wish to reply briefly to the remarks of the gentleman from Posey, and the gentleman from Tippecanoe.

It does strike me that these gentlemen have avoided debating the question that is immediately before us. It is not the veto power, in the ordinary acceptation of the term, that I object to. What I oppose is the pocket veto. I do not wish to deprive the Executive of the right to assign his reasons for being opposed to the passage of a bill, or to prevent him from calling on the legislative body to exercise a sober second thought. I am not opposed to that.

* * * * * * * * * * *

I do not propose to prevent the Governor from reaching his veto and saying it shall not be a law until the Legislature goes over it again, rethinks upon it, and again acts. But it is the pocket veto that I am at war with.

* * * * * * * * * * *

The effect of my amendment, is to let the responsibility stare the Executive in the face. When a measure has been matured, and passed through all the forms of legislation, and sent to him for approval, let him understand that the measures, however fatal to the interests of the country, shall be a law, unless he acts upon it. His nonaction shall

confirm the action of the members. Let him act and approve, or assign his reasons against it, shall be a law.

* * * * * * * * * * *

My proposition is, that if the Governor does not return the bill, with his objections to it, in time for the two Houses of the General Assembly to act upon it, it shall be a law notwithstanding the veto.

* * * * * * * * * * *

My amendment does not strike out or limit the veto power proper. It is to abolish the improper and cowardly exercise of it." 2 Debates, supra at 1329-1330.

While Raridens' motion was pending, another delegate moved to require a three-fifths majority to override a veto. Both of these proposed amendments were tabled by the Convention in the same vote. After two other amendments to the section were defeated, Mr. Rariden, apparently as determined and misinformed as ever, again moved to amend the section by striking the word "not" from the last line, and this motion was defeated (possibly because it was such an anomaly.) The proposal was then engrossed by the convention for a third reading. Section 23, dealing with the veto power over joint resolutions, was also engrossed for a third reading without amendment. Journal, supra at 548-550.

On this same day, a delegate submitted the following proposal which was designated section 29:

"No new bill shall be introduced into either House of the General Assembly within three days before the day of a general adjournment, and no bill shall be presented to the Governor for his approval on the day of a general adjournment, or on the next preceding day." Journal, supra at 551.

The debate that followed the introduction of this new idea is particularly relevant to the case at bar:

"I fear, sir, that some difficulty may grow out of such a provision. We have adopted a provision to be inserted in the Constitution, and a very proper one it is, that the titles of all laws shall indicate the substance of such laws.

This prohibition upon the introduction of bills will prevent the possibility of either House taking up any thing that may have been forgotten or overlooked, and acting upon it at a late period of the session. I never yet seen a legislative body that did not, in the last days of the session, collect up a great many things which had been overlooked, not through any design to keep them back, but in consequence of members being otherwise occupied during the whole session.

* * * * * * * * * * *

Mr. Kelso moved to amend the amendment so as to provide that the Legislature may, by a majority of two-thirds, pass any law within the last three days of the session.

Mr. Edmonston. It seems to me, sir, that such a provision will not accomplish the object which the gentleman from Switzerland has in view. The amendment he proposes is, that the General Assembly may pass any law by a majority of two-thirds, on the last days of the session. This does not remedy the evil.

Mr. Kelso. I will change the amendment so as to make it read 'introduce and pass.'

Mr. Dunn of Jefferson. I am afraid we are carrying our restrictions upon the action of the Legislature too far. It may be proper to prescribe some such rule as that proposed by the gentleman from Lake.

'That the General Assembly should refrain from introducing any new matter within the last few days of the session; but they should have power to act upon that which may have been previously introduced. It might become necessary to remedy some defect in a bill that had been passed in a previous part of the session. It seems to me that we can as well trust this whole matter to the wisdom of the Legislature without any Constitutional provision. I therefore, move to lay the whole subject on the table.

The motion was agreed to, and the section and amendments were laid upon the table." 2 Debates, supra at 1332.

At least as regards its first introduction, a proposal limiting the ability of the legislature to act in the last few days immediately proceeding its general adjournment did not find favor with the Convention.

On the following day, section 22 was given its third and final reading. One delegate moved to recommit the entire section to the Committee on the Executive with instructions to limit the Governor's time to act on each bill to three days and to limit his veto power to permit only objections involving the constitutionality of the legislation. In support of his motion the delegate declared:

"I think then, sir, that this section is fraught with mischief. I understand that by it the Governor *may*, if he chooses so to do, pocket every bill passed within five days before the termination of the session. This is too great a power to be given to any one man. I am willing to see him have a *qualified* veto, and would be disposed to confer on him the right to return a bill, with his objections, provied they were confined to the constitutionality of the proposed measure, but I have great and insuperable objections to his interposing his veto upon any measure, merely upon grounds of expediency *alone*. I cannot but think that when any proposition has received the sanction of the immediate representatives of the people, who, coming fresh from among them, are presumed to be charged with their instructions and wishes, and enjoying their confidence, that it ought not to be outweighed or nullified by the arbitrary fiat of a single individual; and more especially when it is remembered that no law *can* be hereafter passed but by the vote of a majority of the members elect to the Legislature, and *that* confined to general subjects of legislation and gravely and formally expressed by ayes and noes, entered at length upon the journal. I believe that the exercise of the veto power, if thus guarded, might be productive of no mischievous results; but, on the contrary, might have a good effect. If

we restrict the right of the Executive to withhold a bill or resolution to *three* days instead of *five*, as proposed in the section under consideration it would not be so objectionable; still it would be leaving in his hands extraordinary power, which would be liable to great abuse.

In the Constitution of Kentucky it is provided that bills remaining in the hands of the Executive ten days unless returned within three days of the succeeding session, shall become laws. We cannot have that provision here, because of biennial sessions; and if the Governor pockets bills within five days preceding the end of the session, they remain there for two years. This, sir, I will never consent to, and I earnestly call upon the members of this Convention to remedy this evil before it is too late. (Original emphasis.) 2 Debates, supra at 1346.

Although the motion to recommit the proposal to the committee failed to pass, the delegate's remarks apparently had a telling effect on the convention, for when section 22 itself was voted upon by the Convention, it failed to pass, by a vote of fifty-five to fifty-five. Journal, supra at [illegible].

At this point in the Convention, there was no proposal pending or passed, which provided the Governor with any veto power over a bill, much less a pocket veto. The proposal which had been submitted by the Committee on the Legislative Department had been tabled in deference to section 22, and section 22 had been defeated.

At least according to the amount of debate, the major issue which had caused section 22 to be defeated seemed to be the failure of the Convention to find a compromise between two competing interests. On the one hand, a great number of delegates did not want to allow the Governor to be able to veto a bill without his having to resubmit it to the legislature. On the other hand, many delegates were apprehensive about providing that the veto power would be forfeited if not exercised before the adjournment of the General Assembly because they envisioned that the Governor might be presented several bills during the last few days

sons voting for and against the bill, shall be entered on the journals of each House respectively. If any bill shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it, unless the general adjournment prevents its return; in which case it shall be a law unless sent back within three days after their next meeting." Journal, supra at 559-560.

This motion was carried by the Convention so the proposal was to be returned to the committee pursuant to these instructions. Several other proposed amendments were defeated by the Convention, including:

(1) A proposal giving the Governor thirty days after adjournment to return a vetoed bill to the Secretary of State,

(2) A proposal requiring a three-fifths majority to override a veto,

(3) A proposal making the bill a law if not vetoed before the expiration of the current session, and

(4) A proposal providing that a new bill could not be introduced in either House within three days of the final adjournment.

These proposals had been debated prior to section 23's defeat, and the delegates were not willing to reinstate old problems. Thus, section 23 was returned to the Committee on the Executive with instructions to insert a provision giving the Governor a veto power in accordance with the 1816 Constitution. This proposal required the Governor to exercise his veto power within five days unless the general adjournment prevented the return of the bill "in which case it shall be a law unless sent back within three days after their next meeting."

On January 6, Delegate Morrison of the Committee on the Executive reported section 23 to the Convention; it had been amended according to the instructions given to the committee by the Convention. But, as soon as Mr. Morrison had finished the committee report, he moved to amend the section:

Mr. Morrison. Mr. President, it will be discovered by gentlemen, that the section just read is essentially, literally, and positively, the section contained in the old Constitution. And, inasmuch as that section, in my opinion, is not calculated to answer the purpose, as it ought to do, under the new regulations which we shall have to make, in reference to biennial sessions, I shall offer an amendment to it. I do not ask the concurrence of the Convention in that report, for the reason that I now move to concur in the adoption of the section, with an amendment, which amendment is, to strike out the section and insert the following, as a substitute in full.

The President. The Chair would remark to the gentleman from Marion, that there is no question of concurrence. The committee have amended the section under positive instructions from the Convention, and through their Chairman have reported the same back. The question will be upon its passage.

Mr. Morrison. Then, sir, I move that the section be recommitted, with the following instructions: 'provided that bills vetoed by the Governor, may be passed by a majority of all the members elected to the two Houses, to be determined by yeas and nays. Bills to become laws unless returned within three days, unless a general adjournment prevents a return, in which case it shall be a law, unless the Governor, within five days after such adjournment, shall file the same, with his objections, thereto, in the office of the Secretary of State, who shall lay the same before the General Assembly at its next session, for action, in the same manner as if it had been reported by the Governor.'

I will call the attention of the Convention to the alteration which I make. We provide, in the new section, that the Governor shall have but three days instead of five, at the close of the session, to consider bills presented to him. And there shall be no new bills presented to him during the two last days of the sessions, so that he will not be permitted to pocket a bill, but must decide upon it, one

way or the other. If he have not time to examine a bill and return it to the Legislature, previous to the close of the session, he can file it in the office of the Secretary of State, to be presented to the next Legislature, whether the session be a called or a regular one. By this means, there can be no skulking. So far as the veto power is concerned, under the operation of this provision, it will be nothing more than a mere revisory power — nothing but what can be controlled by a majority of the Legislature. Again, in regard to joint resolutions, the proposition contains simply a provision that all joint resolutions which require the signature of the Governor, shall go through the same formula as bills. That is sufficient to indicate to the Legislature, at all times, the course to be pursued in regard to resolutions of this character. I hope the Convention will re-commit, in order to make the change which I have suggested." 2 Debates, supra at 1447-1448.

It is interesting to note that, in the actual instructions proposed by Mr. Morrison, as recorded in the Journal or the Debates, there is no mention of a two day limitation on the presentment of bills to the Governor by the General Assembly. It is in Morrison's remarks to his proposed instructions that any mention of this two-day limitation first appears. Its purpose according to Morrison, was "so that (The Governor) will not be permitted to pocket a bill, but must decide upon it one way or the other." One delegate observed:

> "that he had no particular objection to the proposition, except that part of it which provided that no bill should be sent to the Governor during the last two days of the session. He did not see what use there was in having the legislature in session if it were not at liberty to send bills to the Governor for his approval, until the end of the session." 2 Debates, supra at 1448.

There was no further discussion or debate on this particular provision, and, after two amendments to Morrison's proposal were defeated, the Convention voted to recommit the section to the committee so that the new proposal could be adopted.

On January 23, Mr. Morrison reported section 23, as amended, to the Convention. The section then read as follows:

"Section 23. Every bill which shall have passed both Houses of the General Assembly, shall be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it with his objections to the House in which (sic) shall have originated, who shall enter his objections at large upon their journals, and proceed to reconsider it. If after such reconsideration a majority of all the members elected to that House shall agree to pass the bill; it shall be sent, with the objections, to the other House, by which it shall likewise be reconsidered, and, if approved by a majority of all the members elected to that House, it shall be a law; but in such cases, the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered upon the journals of each House respectively. If any bill shall not be returned by the Governor within three days (Sunday excepted) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it, unless the general adjournment prevents its return; in which case it shall be a law unless the Governor, within five days after such adjournment, shall file the same, with his objections thereto, in the office of the Secretary of State, who shall lay the same before the General Assembly, at its next session, for its action, in the same manner as if it had been returned by the Governor. But no bill shall be presented to the Governor within two days previous to the adjournment of the General Assembly. Every joint resolution, requiring the signature of the Governor, shall be presented to him, and before it shall take effect, be approved by him; or being disapproved, shall be re-passed by a majority of all the members elected to both Houses, according to the rules and regulations prescribed in case of a bill." Journal, supra at 750-751.

The convention, now apparently weary of debating this provision, suspended their rules requiring "yeas" and "nays" to be taken, passed the section without further discussion,

and referred it to the Committee on Revision, Arrangement and Phraseology. 2 Debates, supra at 1787. On February 6, this committee reported the provision back to the Convention as Art. 5, § 14 of the new Indiana Constitution. The section, as amended by the revision committee, was adopted by the Convention without discussion and became part of our 1851 Constitution.

From the vast proceedings and debates which occurred during the Convention, three conclusions may properly be gleaned as regards Art. 5, § 14.

(1) It was the expressed intention of the Convention not to allow the Governor a power to *permanently pocket veto* a bill even if an adjournment of the General Assembly prevented its return.

(2) The provision that prevented presentment of the bills to the Governor during the last two days preceding adjournment was introduced with the expressed intent of requiring the *Governor to act affirmatively* on each bill and was added to § 14 without debate or discussion.

(3) A provision preventing the General Assembly from enacting any new legislation during the last days of a legislative session did not meet with the approval of the Convention and was defeated on at least two different occasions.

COURT INTERPRETATIONS OF THESE PROVISIONS

The first case decided by this court involving the presentment of a bill within the last two days of a legislative session was Bender v. State (1876), 53 Ind. 254. In *Bender*, the Governor, though presented the bill within the last two days, had apparently approved the bill and filed it with the Secretary of State. The court held that the law in question was valid, *the late presentment notwithstanding*.

In arriving at their decision in *Bender*, the court *could* have reasoned that, since all bills must be presented to the Governor, and since there is no express restraint on the

General Assembly's actually enacting legislation during the last two days, the provision preventing a presentment to the Governor during the last two days was only a directive to the legislature and would not be grounds for declaring a bill invalid. Such reasoning *could* have been supported by the intent of the drafters of the provision as exemplified by the proceedings and debates at the Constitutional Convention. Such reasoning *could* have also found support in the practical construction of the provision apparently given by both the legislature and the Governor in treating the presentment as valid. A "practical construction" of the Constitution by the General Assembly "must and does have great weight with the court in deciding the constitutional question." State ex rel. White v. Grant Superior Court (1930), 202 Ind. 197, 208, 172 N.E. 897, 900, 71 A.L.R. 1354. The court was certainly aware that the effect of the decision was to make the validity of a law not dependent upon a strict adherence to the last sentence of Art. 5, § 14, at least where the Governor accepted and acted upon the late presentment.

The court chose, however, to justify its decision in *Bender* by using a different line of reasoning. Citing Evans v. Browne (1869), 30 Ind. 514, it declared that the court was without power to look beyond the enrolled act to ascertain whether it had been passed in conformity to the Constitution. In the *Evans* case, the defendant state auditor had contended that a particular bill had not become law and alleged that when the bill was passed by the House of Representatives, the House had failed to have a quorum of its members present and could not have voted on any bill according to a strict adherence to the Constitution. The court in *Evans* declined to look beyond "the enrolled act and its authentication" by the officers of each House to determine its constitutional validity. Using *Evans* as authority, the court in *Bender* concluded that it would not look behind the bill to see when the required presentment was made to the Governor.

Had the court in *Bender* stated, rather than implied, that a late presentment would not affect the validity of a law,

the question would probably have been settled and the present conflict avoided. Regardless of the reasoning employed by the *Bender* decision, it was cited for the proposition that a presentment in the last two days of a legislative session would not render a bill invalid. See Board of Com'rs of Madison County v. Burford (1883), 93 Ind. 383; Western Union Telegraph Company v. Taggart (1894), 141 Ind. 281, 40 N.E. 1051, 60 L.R.A. 671.

In State ex rel. Colbert v. Wheeler (1909), 172 Ind. 578, 89 N.E. 1, this court held that a Governor did not have to file a bill with the Secretary of State for it to become a law. In that case the bill in question had been presented to the Governor on March 8, and the legislature had adjourned on March 11. When the Secretary of State certified the "Acts of 1895", he indicated that the enrolled bill was "missing", and the court judicially noted that the enrolled act was not on file in that office. Under the circumstances, the court was compelled to look beyond "the enrolled act and its authentication".

> "It is evident that said Enrolled House Act No. 132 became a law unless the Governor vetoed the same as provided by said section 14 of article 5 of the Constitution, whether filed in the office of the Secretary of State or not." State ex rel. Colbert v. Wheeler, supra at 588, 89 N.E. at 5.

At this point the courts had held that a bill's being presented to the Governor in the last two days would not render the law invalid where the Governor signed and filed it with the Secretary of State and that the Governor's not taking any action and not filing a bill with the Secretary of State would not render a law invalid where a proper presentment had been made. How then could this last sentence of Art. 5, § 14 ever be invoked to lend support to a contention that the Governor of Indiana had a pocket veto where the drafters of the very provision relied upon had expressed an intention to allow the Governor no such power?

The only case attempting to answer this question is State ex rel. Owen v. Fortieth Judicial Circuit (1931), 202 Ind.

354, 174 N.E. 423, and this is the case most heavily relied upon by the petitioners in the case at bar. In that case, a bill was actually delivered to the Governor by the Secretary of the Senate on the same day that the 76th session of the General Assembly was adjourned. The bill was retained by the Governor and was never filed with the Secretary of State nor returned to the General Assembly. The court held that the bill had not become law.

The court attempted to distinguish *Bender* and the other cases which had held that a law was valid even though presented during the last two days of the session. It observed that in each of these cases:

> "the bills there questioned, were properly authenticated by the proper officer of each House, and had either been approved by the Governor or else he had deposited them with the secretary of state, without his approval. * * * [and] in the case at bar, the facts do not come up to the abovestated rule, in that the bill is not found in the depository designated by the supreme law." State ex rel. Owen v. Fortieth Judicial Circuit, supra at 357, 174 N.E. at 424.

The court apparently either overlooked or deliberately decided not to discuss State ex rel. Colbert v. Wheeler and other cases which had held that the validity of a law was not dependent on the filing of a bill with the Secretary of State. We can not consider this act to be a prerequisite to a bill's becoming a law; Art. 5, § 14 expressly provides that, when an adjournment prevents the Governor's returning a bill to the General Assembly, "it shall be a law, *unless* the Governor, within five days next after such adjournment, shall file such bill, with his objections thereto, in the office of Secretary of State * * *."

After attempting to distinguish the previous cases, the court justified its holding in two sentences:

> "The bill here in question was presented or attempted to be presented to the Governor between 5 and 7 o'clock [p. m.] on the last day of the session. No official action was taken by him, neither was there any obligation im-

posed upon him to act, as the bill was not presented to him more than two days next previous to the final adjournment of the General Assembly." State ex rel. Owen v. Fortieth Judicial Circuit, supra at 358, 174 N.E. at 424.

These two sentences, constituting the only positive reasoning for the court's decision, should be carefully scrutinized. We do not believe that anything can be proved by pointing out that no obligation was imposed on the Governor to act on the bill in question, for, regardless of when the bill is presented to a Governor, he has no constitutional obligation to act on it. It is for this very reason that Art. 5, § 14 provides that a Governor's inaction will result in a bill's becoming a law. We can find no justification for the holding in State ex rel. Owen v. Fortieth Judicial Circuit, and we find it in conflict with Art. 5, § 14, the intentions of the drafters of that provision, and the other decisions of this court. For this reason, we are of the opinion that the holding in that case should be overruled by this court.

We find no other cases directly related to the power of the Governor to pocket veto a bill presented to him on the last two days of a legislative session.

CONCLUSIONS

From the foregoing discussion, certain conclusions may properly be made as regards the power of the Governor to pocket veto a bill:

(1) No such power is expressly provided by the Indiana Constitution.

(2) Following well-established rules of interpretation, no such power should be implied unless to accommodate the unquestioned intentions of the framers of our present Constitution.

"The veto power is a restriction upon the legislative branch of the government and is in derogation of the general plan of government for the separation of powers. This power, therefore, must be strictly construed." Hendricks v. State ex rel. Northwest Indiana Crime Comm. (1963), 245 Ind. 43, 52, 196 N.E.2d 66, 70.

"* * * (W)e are dealing with a legislative enactment under a constitution which provides:

> "The Legislative authority of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives. * * *" Art. 4, § 1, Indiana Constitution.

Since the Indiana Constitution provision granting veto power of the Governor has been transferred from the Legislative branch of the government to the Executive branch of our government, it is merely a limitation on the power fundamentally vested in the Legislature. Such limitation should therefore be exercised only as it is expressed in clear and unambiguous terms within the constitutional provision itself." (concurring opinion) Hendricks v. State ex rel. Northwest Indiana Crime Comm., supra at 59, 196 N.E.2d at 73.

(3) From the proceedings and debates of the Constitutional Convention of 1850, it does not appear that the delegates wished to allow the Governor the power to pocket veto any legislation. In proposing the provision which ultimately became Art. 5, § 14 of the Indiana Constitution, Delegate Morrison announced to the Convention:

> "We provide, in the new section, that the Governor shall have but three days instead of five, at the close of the session, to consider bills presented to him. And there shall be no new bills presented to him, during the two last days of the sessions, *so that he will not be permitted to pocket a bill, but must decide upon it, one way or the other.* If he have not time to examine a bill and return it to the Legislature, previous to the close of the session, he can file it in the office of the Secretary of State, to be presented to the next Legislature, whether the session be a called or a regular one. *By this means, there can be no sulking. So far as the veto power is concerned, under the operation of this provision, it will be nothing more than a mere revisory power—nothing but what can be controlled by a majority of the Legislature.*" (Our emphasis.) 2 Debates, supra at 1447-1448.

(4) There is no previous case law which presents a sound basis for holding that the Governor has a pocket veto. The decision relied upon by the petitioners, State ex rel. Owen v. Fortieth Judicial Circuit, supra, presents no persuasive justification for implying such a power in derogation of the expressed intention of the framers of our constitution and should be overruled.

For all the foregoing reasons we believe the following interpretation must be given to Art. 5, § 14.

(1) There is no provision, express or implied, which prevents the General Assembly from enacting new legislation during the last two days of a legislative session.

(2) Legislation enacted during this two day period should be presented to the Governor in accordance with the first sentence of Art. 5, § 14.

(3) The last sentence of Art. 5, § 14, which declares no bill "shall" be presented to the Governor during the last two days of a legislative session should be interpreted as a directive to the General Assembly, and the Governor as regards legislation which *can* be presented prior to that time, but no law should be deemed invalid because a presentment was made during these last two days.

(4) There is but one way for a Governor to exercise a veto power in Indiana. If the legislature is still in session the Governor must return the bill with his objections to the House in which the bill originated within three days after it is presented to him. If an adjournment prevents such a return, the Governor must file the bill with his objections with the Secretary of State within five days after such adjournment. If a Governor fails to take any action on a bill that has been duly passed, properly authenticated and presented to him for his approval, the bill will become a law regardless of when the presentment shall have occurred.

Applying these interpretations to the case at bar, we believe House Enrolled Act No. 1818 became a law five days after the adjournment of the 95th General Assembly. It follows that the result reached by the Appellate Court

pertinent part as follows: "I will call the attention of the Convention to the alteration which I make. We provide, in the new section, that the Governor shall have but three days instead of five, at the close of the session, to consider bills presented to him. *And there shall be no new bills presented to him during the last two days of the sessions, so that he will not be permitted to pocket a bill, but must decide upon it, one way or the other.*" (Emphasis supplied.)

I call attention to Article 5 Sec. 14 of our present constitution and specifically to the last sentence thereof, which reads as follows: "BUT NO BILL SHALL BE PRESENTED TO THE GOVERNOR, WITHIN TWO DAYS NEXT PREVIOUS TO THE FINAL ADJOURNMENT OF THE GENERAL ASSEMBLY." (Captialized for emphasis).

The intent of the delegates to the 1850 constitutional convention to eliminate the pocket veto was indicated in the debates, the method by which that intent was to be accomplished was shown by the remarks of the delegate, Mr. Morrison. The adoption of that intent and method is shown by the last sentence of the preceding paragraph of this opinion.

Thus in the case at bar, the General Assembly of 1967, in the face of the intent of the framers of the constitution of 1852, in open defiance and violation of the clear and plain mandate of the constitution, with full knowledge of the consequences flowing therefrom, presented House Enrolled Act No. 1818 to the Governor on the last day of the 1967 session of the General Assembly. That act imposed no duty and no obligation on the Governor to take any action on House Enrolled Act No. 1818, nor did such act become law without the Governor's signature as the very act of presenting it within the proscribed time nullified it in toto unless the Governor did in fact sign such enrolled act and deposit the signed act in the office of the Secretary of State.

The Appellate Court majority opinion contains the following citation, and we quote therefrom: "In the volume, Constitutional Limitation, by Cooley, 8th Edition, Volume 1, page 355, Cooley makes the following statement concerning state constitutions:

"'That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law.'"

On page 81 of the same volume, we find the following statement:

"'By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law.'"

I deem it unnecessary to further expand this opinion as the constitutional mandate is clear and the violation thereof by the 1967 General Assembly only too apparent, as are the consequences of such violation. This cause should be transferred to this Court, the erroneous judgment of the Appellate Court reversed, and said cause remanded thereto with instructions to sustain defendant's motion for judgment, all at the costs of the plaintiff.

DeBRULER, C. J., concurs.

GIVAN, J., not participating.

Appendix C

HOUSE ENROLLED ACT No. 1818

AN ACT to amend an act entitled "An Act to provide for a tax on inheritances, bequests, legacies, devises, successions, gifts and transfers of property in certain cases, repealing all acts or parts of acts in conflict therewith and declaring an emergency," by providing for the distribution of taxes levied to certain county and state funds.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. Acts 1931, ch. 75, s. 36 is amended to read as follows: Sec. 36. Ninety percent (90%) of the receipts from the inheritance tax imposed by this act which are deposited in the Inheritance Tax Account in the State Treasury pursuant to this act on and after January 1, 1967, shall be distributed to the general funds of the counties from which said tax was received: Provided, however, That the sum of five dollars ($5.00) may be allowed to prosecuting attorneys in each case wherein they are required to appear on behalf of the state under the provisions of Section 15 of this act, said fees to be taxed as part of the costs in case and to be paid by the person or corporation from whom the tax is due: Provided, however, That in any county containing a city of the first class in which there exists a metropolitan thoroughfare or mass transportation authority, created pursuant to statute, that county's share of such money shall be distributed to said authority, and that in any county containing two or more cities of the second class, ninety percent (90%) of the county's share of such money shall be dedicated to the construction and maintenance of community mental health centers, and the remaining ten percent (10%) of such money shall be distributed to the county general fund. On or before the last day of April, 1967, and thereafter, on or before the last day of July, October, January and April of each year, the Inheritance Tax Administrator shall certify to the Auditor of the State of Indiana the amount of tax deposited by each county during the preceding fiscal quarter. The Auditor of the State of Indiana shall thereupon issue warrants to the Treasurer of the State of Indiana ordering payment to the respective

county general funds or metropolitan thoroughfare or mass transportation authority or community mental health centers, as required by this section. Each county shall be paid ninety percent (90%) of the amount of inheritance tax deposited by it during the preceding fiscal quarter. All other revenue derived from the imposition and collection of the inheritance tax imposed by this act shall remain in the state treasury and be credited to the state general fund.

SEC. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be effective on and after passage.

REPEAL OF HOUSE ENROLLED ACT 1818

CHAPTER 20

[H. 1115. Approved February 12, 1969.]

AN ACT to repeal House Enrolled Act No. 1818 entitled "An Act to amend an act entitled 'An Act to provide for a tax on inheritances, bequests, legacies, devises, successions, gifts and transfers of property in certain cases, repealing all acts or parts of acts in conflict therewith and declaring an emergency,' by providing for the distribution of taxes levied to certain county and state funds," passed by the 1967 Session of the General Assembly, but not published as law.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. The above entitled House Enrolled Act No. 1818 passed at the 1967 Session of the General Assembly is hereby specifically repealed retroactive to the date and time of its enactment.

SEC. 2. If any section, sentence, clause, phrase or word of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other applications or provisions of this act, as it is the intent of the General Assembly that the remainder shall have full force and effect.

SEC. 3. Whereas an emergency exists for the more immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

MANDATE JUDGMENT SECTION

Burns' § 3-2205—"Notice of judgment—Enforcement. All defendants duly served with process, or notified by publication in such action, shall take notice of the judgment and mandate of the court therein, and shall promptly perform the mandate thereof; and obedience to such judgment and mandate may be enforced by attachment, and fine or imprisonment, or both. [Acts 1881 (Spec.Sess.), ch. 38, § 810, p. 240; 1911, ch. 223, § 5, p. 541.]"

AUDITOR'S WARRANT STATUTES
CRIMINAL STATUTE

Burns' §10-3715—"If the auditor of state shall draw any warrant upon the treasurer of state, unless there be money in the treasury belonging to the particular fund upon which such order is drawn to pay the same, and in conformity to appropriations made by law, he shall, on conviction, be fined not less than one hundred dollars [$100] nor more than one thousand dollars [$1,000], and be imprisoned in the county jail not less than one [1] month nor more than six [6] months. [Acts 1905, ch. 169, § 520, p. 584.]"

CIVIL STATUTES

Burns' § 49-1809—"The treasurer of state is expressly prohibited from paying any money out of, or transferring any money from, the treasury of state, except upon the warrant of the auditor of state; and the auditor shall examine, with care, every demand and claim presented for payment, and shall be satisfied that every claim is just, legal, and unpaid, before he shall allow, audit, or countersign it; and, for that purpose, may require the affidavit of the claimant, or other evidence; and he shall require every claim to specify the particular items of indebtedness, but when satisfied that any claim is just, legal and unpaid, and if there be money to the credit of the fund, and not before, the auditor shall issue his warrant on the treasurer for its payment out of the proper fund; and if there be money of such fund in the treasury when the warrant is presented, the treasurer shall pay it, but not otherwise; and when paid, the treasurer shall take a receipt therefor on the back, and shall cancel

the warrant with a canceling hammer, and shall register, file and preserve the same [Acts 1859, ch. 138, § 7, p. 227.]"

Burns' § 49-1810—"The auditor of state shall at no time draw a warrant upon the treasurer of state unless there be money in the treasury belonging to the fund upon which the same is drawn to pay the same, and in conformity to appropriations made by law, and on money actually in the treasury subject to the payment of the same; and the auditor of state shall enter upon his books the number, date, payee, and amount of every draft in favor of the treasurer of state, and properly charge and credit the same to the appropriate fund, so as to keep an exact debit and credit account with each particular fund in the treasury; and the auditor shall carefully file and preserve such claim as his voucher for issuing the warrant [Acts 1859, ch. 138, § 8, p. 227; 1937, ch. 168, § 1, p. 873.]"

Burns' § 49-1702—"Duties.—He shall: * * * Fifth. Examine and liquidate the claims of all persons against the state in cases where provisions for the payment thereof shall have been made by law; and when no such provisions, or an insufficient one, has been made, to examine the claim, and report the facts, with his opinion thereon, to the legislature; and no allowance shall be made to refund moneys from the treasury without his statement either for or against the justice of the claim. * * * [I.R.S. 1852, ch. 7, § 2, p. 146.]"

SUBSTITUTION OF PARTIES

Burns' § 2-227—"Death or disability of party—Transfer of interest—Abatement or continuance of action.—No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion or supplemental complaint, at any time within one [1] year, or on supplemental complaint afterwards, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may

allow the person to whom the transfer is made to be substituted in the action. [Acts 1881 (Spec.Sess.), ch. 38, § 23, p. 240.]"

Burns' § 2-228—"New party—Notice.—When a new party is introduced into an action as a representative or successor of a former party, such new party is entitled to the same notice, to be given in the same manner as required for defendants in the commencement of an action. [Acts 1881 (Spec.Sess.), ch. 38, § 848, p. 240.]"

REMOVAL STATUTE

Burns' § 3-2129—"Procedure and practice in Appellate Court—Service of papers—Fees—Lien of judgment.—Procedures and practices, including fees and costs, to the extent not otherwise provided in this act [§§ 3-2121—3-2131] and in the rules of the Appellate Court of Indiana, shall be governed by the existing statutes and the rules governing civil actions in circuit courts, as they may be amended. Process shall be issued by the clerk of the Appellate Court of Indiana and may be directed to the sheriff of any county, but any writ (including summons, subpoena, and all court orders and notices of hearing) may be served by any officer in the state now authorized by law to serve the process of any court and, when now permitted by law or when ordered by a judge of the Appellate Court of Indiana, by any competent person. Fees now required by law to be paid into any fund of the county, in the case of circuit court actions, when paid for services performed by a circuit or county officer, or other local officer, shall be paid into such fund of the officer's county. Clerk's fees shall be governed by rules of the Appellate Court of Indiana. A judgment of the Appellate Court of Indiana shall become a lien on real estate in any county only when a certified copy thereof is filed with the clerk of the circuit court for that county and entered in the judgment docket of that court. The clerk of the circuit court of each county where the judgment is so entered shall issue writs of execution thereon which shall be executed by the county sheriff, all in the manner now provided by law for circuit court judgments. [Acts 1965. (2nd Spec. Sess.), ch. 7, § 11, p. 28.]"

TERMINATION OF M.T.A.

Burns' § 48-9353—"Transportation powers.—On the effective date [January 1, 1970] of this act, the consolidated city and the department of transportation shall have the following powers, duties and obligations:

(a) All transportation powers, heretofore or hereafter conferred by law upon the common council, the board of public safety, the department of traffic engineering, the city traffic engineer, the parking meter department, the park department, and the department of off-street parking, of a city of the first class, or prior to such effective date of the first class city.

(b) All transportation powers heretofore or hereafter conferred by law upon the board of county commissioners, the county surveyor, the county highway department or the county council of the county.

(c) All the powers, obligations and duties of the mass transportation authority created by Acts 1967, c. 311 [§§ 36-3431—36-3455], and the metropolitan thoroughfare authority created by Acts 1963, c. 386 [§§ 36-3401—36-3420].

(d) The power to effect street lighting in the police special service district on its behalf, and elsewhere in the county on behalf of the department.

After such effective date, the mass transportation authority shall cease to exist as a separate municipal corporation. [Acts 1969, ch. 173, § 1003, p. 357.]"

Appendix D.

STATE OF INDIANA
OFFICE OF THE SECRETARY OF STATE

SECRETARY OF STATE

I, WILLIAM N. SALIN, *Secretary of State, of the State of Indiana, hereby certify that the following and hereto attached is a full, true and complete copy of* the Oath of Office of Trudy Slaby Etherton, Auditor of the State of Indiana, bearing filed date of December 3, 1968 *as the same appears on file, as the law directs, in this office.*

In Witness Whereof, I have hereunto set my hand and affixed the seal of the State of Indiana, at the City of Indianapolis, this 8th *day of* December, 1969.

WILLIAM N. SALIN
Secretary of State.

By .....
Deputy

FILED

Dec. 3—1968
William N. Salin
Secretary of State Indiana

STATE OF INDIANA
SS:
COUNTY OF————

I, *Trudy Slaby Etherton,* do solemnly swear that I will support the Constitution of the United States, the Constitution of the State of Indiana and that I will faithfully and impartially discharge my duties as *Auditor of State*
State of Indiana
to the best of my skill and ability, so help me, God.
Trudy Slaby Etherton

Subscribed and sworn to before me this *First* day of *December,* 1968.

Bette L. Seiger
Notary Public

My commission expires April 17, 1972.

IN MEMORIAM

CHARLES W. COOK, JR.

To the Chief Justice and Associate Justices
of the Appellate Court of Indiana:

Your committee reports the following memorial for Charles W. Cook, Jr., who was a member of this court at the time of his death on November 21, 1968:

Judge Cook was born in the City of Indianapolis in 1906. A lifelong resident of the Indianapolis area, he was graduated from School 60, Shortridge High School and the Indiana University Law School.

He practiced law in Indianapolis from 1929 until his election to the bench. During the 1927-1928 he served as a law clerk to the late Judges Willis E. McMahan and Charles F. Remy of the Appellate Court of Indiana. Most of his law practice was in the area of civil law. From 1929 to 1939 he was an associate, then a member of the firm of Bingham, Mendenhall and Bingham. From 1939 to 1949 he was a member of the firm of Bingham, Cook and Bingham, and in September, 1949, he became a member of the firm of Cook and Mendenhall.

Immediately prior to his election as Judge of the Appellate Court of Indiana he was associated with the firm of Bose, Buchanan, McKinney and Evans. Politically he was an ardent Republican, and for many years took an active interest in party affairs. He served on the speaker's bureau and in other capacities for the Indiana Republican State Central Committee, and was a delegate to the 1960 and 1964 Republican National Conventions.